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# In the Supreme Court of the United States.

OCTOBER TERM, 1923.

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THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES OF AMERICA, appellants,

*v.*

FREDERICK Y. ROBERTSON.

No. 273.

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*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

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**BRIEF ON BEHALF OF THE ALIEN PROPERTY CUSTODIAN AND THE TREASURER OF THE UNITED STATES, APPELLANTS.**

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## PRIOR PROCEEDINGS.

This appeal is from each and every part of a decree or order of the Circuit Court of Appeals for the Second Circuit, modifying and affirming, as modified, a decree of the United States District Court for the Southern District of New York, in a suit purporting to have been brought under Section 9 of the Trading-with-the-Enemy Act, as amended (40 Stat. L. 411).

That statute, as it stood when this suit was brought, contained the following provisions:

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> That *any person, not an enemy or ally of enemy, claiming any interest, right, or title in any money or other property* which may have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, *or to whom any debt may be owing from an enemy, or ally of enemy,* whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, *may file with the said custodian a notice of his claim* under oath and in such form and containing such particulars as the said custodian shall require; *and the President,* if application is made therefor by the claimant, *may, with the assent of the owner* of said property and of all persons claiming any right, title, or interest therein, *order* the *payment, conveyance, transfer, assignment, or delivery to said claimant* of the money or other property so held by the alien property custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. *If the President*

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*shall not so order* within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, *said claimant may*, at any time before the expiration of six months, after the end of the war, *institute a suit in equity in the district court* of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the alien property custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), *to establish the interest, right, title, or debt so claimed*, and if suit shall be so instituted then the money or other property of the enemy or ally of enemy, against whom such *interest, right, or title* is asserted, or *debt* claimed, shall be retained in the custody of the alien property custodian or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the alien property custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated * * *.

(*Italics* are ours throughout this brief, except as otherwise stated.) 41 Stat 970

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The appeal is taken by the Alien Property Custodian and the Treasurer of the United States, who were the only defendants appearing in the case. They were ordered by the District Court's decree to pay to plaintiff the sum of $259,597.21, together with interest from July 3, 1919, amounting to $31,081.60 and costs, charges, and disbursements, amounting to $8,599.09,—all out of the property and money of certain Germans, named as defendants, viz: Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer, and Emil Beer, copartners in the firm of Beer, Sondheimer & Company. Cross appeals from the decree of the District Court were taken to the Circuit Court of Appeals. There the decree was modified so as to award plaintiff interest from June 29, 1916, thus increasing the sum which the present appellants, Miller and White, are ordered to pay out of the moneys and property of the German defendants, by about $46,900.

The District Court's decree, as modified and affirmed, also contains a paragraph adjudging recovery of the principal sum from the aforesaid German defendants, N. Sondheimer, A. Sondheimer, Wershner, L. Beer, and E. Beer; but no service of process on said defendants was ever had in this country and they did not personally appear in the action. (This feature of the case, however, is unimportant, because, as stated on page 3 of the brief of plaintiff's counsel in the Circuit Court of Appeals, it has been stipulated "that the decree should not be enforced in any way against the Germans.")

Jurisdiction of the subject matter has been challenged from the outset. The first step taken in this cause by the Alien Property Custodian and the Treasurer of the United States was a motion to dismiss the bill of complaint on the ground that the amount claimed to be owing to the plaintiff consisted of an unliquidated claim for damages and not a "debt" within the meaning of Section 9 of the Trading-with-the-Enemy Act. (Record pp. 11, 23.) The motion was denied, and the plaintiff was given two weeks to move to amend by bringing in the enemies, Beer, Sondheimer & Co., as parties to the suit The order overruling the motion to dismiss did not expressly pass upon the essential point raised by the motion. (Rec. p. 13.)

Thereafter the bill of complaint was amended, making the enemies parties defendant to the suit, and service by publication was ordered. To the amended bill of complaint the Alien Property Custodian and the Treasurer of the United States filed an answer. (Rec. p. 35.) A motion to strike out some of the defenses was made; and portions of the answer were stricken out, with the proviso that the bill of complaint be again amended in certain particulars. A second amended bill of complaint was thereafter filed. (Rec. p. 43.) To the second amended bill of complaint the Government defendants filed an answer denying the material allegations of the bill of complaint and setting up several affirmative defenses. (Rec. p. 52.)

Upon the second amended bill of complaint and the Government's answer thereto, the cause went to a hearing upon the merits before the Honorable Augustus N. Hand, District Judge. After passing upon certain points of law, he referred the case to a Master (Rec. p. 62), to ascertain and report the damages suffered by the plaintiff. Testimony was taken before the Master, who rendered a report thereon, awarding damages to the plaintiff. (Rec. p. 64.)

Various exceptions were taken by both the plaintiff and the Government defendants to the Master's report. The Court, however, entered an order confirming the Master's report and awarding damages and interest, as specified above. (Rec. p. 97.) The final decree was entered accordingly. Cross appeals having been taken, as above mentioned, the Circuit Court of Appeals modified the decree by allowing plaintiff interest from June 29th, 1916, instead of only from July 3, 1919.

The present appeal to the Supreme Court is founded upon Section 241 of the Judicial Code (36 Stat. L. 1157), the case being one where jurisdiction, if any, is dependent upon a Federal Statute. The defendant-appellants challenge, and have throughout challenged, the jurisdiction of the courts below. The plaintiff's claim of a right to bring a bill in equity against the present appellants is dependent solely upon the provisions of Section 9 of the Trading-with-the-Enemy Act, and a question involving the interpretation of that section, namely, whether plaintiff's unliquidated claim for damages constitutes a "debt"

within the meaning thereof, is before the Court, being raised by appellants' Fourth Assignment of Error. (Rec. p. 672). This appeal is well taken under Section 241 of the Judicial Code (36 Stat. L. 1157), since no section of the latter statute makes a decree of the Circuit Court of Appeals final in cases arising under the Trading-with-the-Enemy Act.

### THE FACTS PROVED.

The plaintiff is assignee of a claim of the Mammoth Copper Mining Company of Maine, against the enemy defendants—Beer, Sondheimer & Company for "damages" consisting of prospective profits under an executory "contract" alleged to have been broken by Beer, Sondheimer & Company. The agreement sued upon related to the purchase and sale of zinc ore, the Mammoth Company being called the seller, and Beer, Sondheimer & Company the buyer. It was entered into in writing on September 29, 1914 (Rec. p. 120, fol. 262,) although the contract was dated August 26, 1914. The proposed consideration of the written agreement was stated therein as follows:

> That for and in consideration of the sum of $1.00 each to the other in hand paid by the parties herein, and the mutual terms and agreements herein contained, the seller agrees to sell and deliver and the buyer agrees to purchase and receive the products hereinafter specified upon the terms and conditions hereinafter set forth. (Rec. p. 49, fol. 112.)

The "products" thus mentioned, the subject matter of the agreement—the thing to be sold and bought—was defined as "the total *production* of *zinc* ore *shipped* by the seller from its properties in Shasta County, California." (Rec. p. 49, fol. 112.) The agreement continued to the effect that the buyer (the Beer, Sondheimer firm) was not to be obligated to accept any of the product running less than 33 per cent metallic zinc; but in the event that the seller (the Mammoth Company) produced a product running less than 33 per cent metallic zinc, the buyer reserved the option to purchase. If the buyer should not elect to accept such product, the seller had the privilege of disposing of it elsewhere. The period of the agreement was to be one year from the date of first shipment after completion of a picking plant, which the agreement stated that the seller "contemplates building"; but it was limited in any event to eighteen months from date of execution. The agreement provided for a place of delivery, and especially regulated the routing, the sampling, and the assaying of the ore. Provision was made as to the rate of payment for the contents of the ore. (Rec. p. 51.) The prices payable were to be regulated by the St. Louis price of spelter (i. e. pure zinc), calculating from a basic price of $19 per ton for ore containing 40 per cent zinc with a St. Louis spelter price of $5 per hundredweight, and increasing or decreasing 5 cents per ton for the ore with each rise or drop of one cent in price of spelter above or below $5 per hundredweight. There were similar provisions with respect to the

gold, silver, lead, copper, iron, and silica expected to be found in the ore, which, however, were not so important as the zinc. (Rec. 51.) It was also provided that "shipments were to be made as near as possible in equal weekly quantities." (Rec. p. 50.)

When, in September, 1914, the Mammoth *Copper* Mining Company executed this alleged contract relating to *zinc* ore, it had no established *zinc* mine. It had no regular monthly or weekly output of zinc ore. In the previous spring it had discovered that its properties contained a body of zinc ore near its copper mines; and it had done considerable exploratory and development work on this ore body, reaching a conclusion that the zinc was there in sufficient quantities to make it worth mining. But this work, which was all that had been done up to the time this agreement was executed, had resulted only in a comparatively slight and incidental production of zinc ore. It was admitted by plaintiff's witness that serious mining, resulting in a regular weekly or monthly production, was not begun until January, 1915. (Rec., pp. 139–140, fols. 294–297.)

Shortly after the execution of this "contract" and before any ore had been shipped thereunder, and in reply to an inquiry from Beer, Sondheimer's agent about tonnages, Manager Metcalf of the Mammoth Company sent the following telegram (Rec., p. 613):

> Zinc ore tonnage depends altogether on market price of spelter. (Defendant's Exh. J.)

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Later, in answer to similar inquiries, Metcalf sent two more replies to the same effect (Rec., p. 614), namely:

> With spelter quotations below five shipments will be very light; if it rises above five will probably ship about two hundred tons per month. (Defendant's Exh. L.)
>
> If spelter remains above five estimate December tonnage at two hundred. (Defendant's Exh. N.)

Between the 29th of September, 1914, and the 26th of February, 1916, the Mammoth Copper Mining Company, of Maine, claims to have produced and shipped from its mine and property 10,974.313 tons of zinc crude ore having 33 per cent or more metallic zinc. Beer, Sondheimer & Company accepted and received from the Mammoth Copper Mining Company 1,448.382 tons of the said ore, and paid therefor, at the prices called for by the agreement, the sum of $30,997.81.

In 1915 and 1916 the World War brought about a most unusual situation in the zinc ore and spelter market of the United States. Spelter, the finished product, i. e., the zinc which has been extracted from ore through smelting, went to exceptionally high figures, while crude zinc ore simultaneously went down in price. The pure zinc was in great demand for munitions for the Entente Allies; while the crude ore, cut off from its normal German market, was glutting the American market, being produced here and imported from Australia, Spain, and other

countries faster than the smelters could refine it. (Rec. pp. 304 et seq.)

In the autumn and early winter of 1914 the Mammoth Copper Mining Company was making very light shipments and stating in the telegrams quoted above that the amount the company would ship would depend upon whether spelter quotations might rise. But when, late in the winter and early spring, the abnormally high prices of spelter occurred with the abnormal lack of demand for ore, the Mammoth Copper Mining Company proposed to deliver to Beer, Sondheimer & Co. the 9,525,931 tons of zinc ore in much greater average monthly quantities than had been contemplated. Under these circumstances Beer, Sondheimer & Company wired to the Mammoth Company, on March 6, 1915, and pointed out that the daily shipments of zinc ore by the latter were becoming very much larger than the previous average. Their telegram said:

> Are advised you shipped from March sixth to ninth fifty tons zinc ore daily whilst your average shipments since beginning contract amounted to only about two hundred tons monthly. In view of abnormal conditions, we will only accept tonnages reasonably equal to the average monthly amount shipped heretofore. We are unable to receive and smelt any other tonnages in accordance with page 5 of our contract with you. We have advised all other shippers accordingly. (Rec. p. 465, Plaintiffs Exh. "53".)

After this telegram and after a conference, at which the Mammoth Company insisted it had the right to ship as it pleased, Beer, Sondheimer & Company wrote a letter explaining their reasons for refusal as follows (Rec. p. 615, Exh. "O"):

*April 6, 1915.*

*Mammoth Copper Mining Company,*
*Newhouse Building, Salt Lake City, Utah.*

*Dear Sirs:* We regret that at the personal conference which Mr. Elkan held yesterday with your Mr. Lyon, we were not able to get Mr. Lyon on your behalf to recede from the position that you are entirely free, in your discretion, to refrain altogether from shipping us any ore, or to ship to us as much as you may desire. Mr. Lyon insists that you have the right to ship nothing or to ship 4,000 tons a month, as you may desire, and he takes the position that it would be entirely as a favor to us for you to limit your shipments to 1,200 tons a month.

We have been anxious to avoid litigation and to make a satisfactory arrangement with you before bringing lawyers into the matter at all, and to that end we have withheld writing you until we had conferred with Mr. Lyon. As you know, it has always been understood that your shipments of ore would not exceed 400 tons a month, and until March your monthly shipments were far below that figure. There is, of course, a limit to the amount of ore which our smelter can handle, and we can not permit you, merely because the price of spelter has risen, to treat as much of your

product of zinc crude ore as you may desire; furthermore, an examination of the recent shipments shows that the shipments did not consist of crude ore. You, of course, have fully understood that we would not accept concentrates.

We now wish formally to advise you that, waiving no legal rights as to whether we are legally bound to accept any shipments and merely seeking to establish a harmonious working arrangement, we are willing to arrange to take delivery from you of zinc crude ore not to exceed a maximum of 400 tons per month. Any receipts in excess of that tonnage, as well as any shipments containing anything except crude ore will not be accepted; and please permit us again to state that we will be glad at any time to try again in personal conference with your representative to make an arrangement which is mutually satisfactory.

Very truly yours,

BEER, SONDHEIMER & CO., A. B.

The Mammoth Company replied to this letter on April 15, 1916, by insisting that Beer, Sondheimer & Company would have to take the total production of the mine. (Rec., p. 616.) The result was that Beer, Sondheimer & Company refused to accept or pay for ore thereafter tendered to them. Subsequently the Mammoth Copper Mining Company purported to sell the 9,525,931 tons of zinc crude ore to a company affiliated with it for $238,278.76. This was alleged to be the best obtainable price, the market value at that time being difficult to ascertain. Had Beer, Sondheimer &

Company accepted this crude ore under the terms of the alleged contract, plaintiff claims that the Mammoth Copper Mining Company would have received from Beer, Sondheimer & Company the sum of $511,103.64. The plaintiff claimed as damages the difference between the amount Beer, Sondheimer & Company would have paid, had it accepted the ore, and the amount received upon the alleged resale. (Rec. pp. 45–46.)

The calculation of each of these sums was a *difficult* and *complex* matter. The contract price was left to be determined in an indirect manner from St. Louis spelter (pure zinc) quotations, with certain additions and subtractions dependent upon the rise and fall of the St. Louis market and the actual zinc content of each shipment. (Rec. p. 51.) The 9,525.931 tons of ore were not all shipped and refused at one time. (Rec. pp. 463, 466, 467–468.) Assays of each lot had to be made separately. (Rec. p. 214–6.) The contract price of each lot differed, as spelter quotations varied widely. (Rec. pp. 622–23.) As the freight was to be paid ultimately by the seller, elaborate calculations as to how much freight charges Beer, Sondheimer & Company would have been entitled to deduct, also were necessary. (Rec. p. 373.) The cross appeal claims that this freight charge has not even yet been correctly decided.

Furthermore, in calculating interest on the damages further elaborate figuring was necessary, based upon the dates from which the German defendants would have had to pay for the ore, less interest

earned by the Mammoth Company during the average period between the dates of the resale shipments and the dates of the credit memoranda given to the Mammoth Company by the parent concern at Boston. (Rec. p. 85.)

The resale of the ore was made by the Mammoth Copper Mining Company to the United States Smelting Company. (Rec. pp. 69, 489.) It is not disputed, and the Master found, that both the Mammoth Copper Mining Company of Maine and the United States Smelting Company were subsidiaries of the United States Smelting, Refining & Mining Company, a corporation of Maine. (Rec. p. 71.) All the stock of both of the subsidiary companies was owned by the United States Smelting, Refining & Mining Company; and the executive officers and the boards of directors of the subsidiary companies and of the holding company were identical, although each of the subsidiary companies had a separate general manager and an operating staff of its own. The financial accounts of both subsidiary companies were kept in the office of the holding company in Boston, Massachusetts, and in its books. In the settlement between the Mammoth Copper Mining Company and the United States Smelting Company, on the resale of the ore refused by Beer, Sondheimer & Company, no cash passed between the seller and the buyer; but settlement sheets of the different shipments were made out in due form. (Rec. p. 71.)

The Alien Property Custodian, after the passage of the Trading-with-the-Enemy Act of October 6, 1917, seized large amounts of property held for and owned by the members of the copartnership of Beer, Sondheimer & Company. The Custodian now has this property in his possession, and the Treasurer of the United States holds the money so seized. It is out of this money and property that the plaintiff seeks to have paid to him the alleged damages for the alleged breach of contract committed by Beer, Sondheimer & Company.

ASSIGNMENTS OF ERROR.

The chief errors relied upon by the appellants, the Alien Property Custodian and the Treasurer of the United States, are:

(1) The holding of the Courts below that plaintiff's unliquidated claim for damages for breach of contract was a "debt," within the purview and meaning of Section 9 of the Trading-with-the-Enemy Act, and the failure to dismiss the bill, on the ground that it appears upon the face thereof that said claim was not such a "debt." (Rec. p. 672, 4th Assignment.)

(2) The holding that the contract in suit was valid and enforcible, and not void for lack of mutuality and not void for indefiniteness. (Rec. p. 673, 6th and 7th Assignments.)

(3) The holding, in effect, that the members of the copartnership of Beer, Sondheimer & Company entered into a binding contract with the Mammoth Copper Mining Company for the purchase of so much

of the total production of zinc crude ore as the Mammoth Copper Mining Company might choose to ship from its properties in Shasta County, California. (Rec. p. 673, 9th, 10th, 12th, 13th, and 15th Assignments.)

(4) The modification of the decree below so as to allow interest from June 29, 1916. (Rec. p. 672, 1st Assignment.)

(5) The affirming of the decree of the District Court in all other respects. (Rec. p. 672, 2d Assignment.)

(6) The holding that the plaintiff came into equity with clean hands. (Rec. p. 673, 14th Assignment.)

(7) The holding that the Mammoth Company duly performed its contract and did not breach it by failing to ship "in as near as possible equal weekly quantities." (Rec. p. 673, 11th and 13th Assignments.)

The other errors relied upon are shown in the appellant's Assignment of Errors in Record (pp. 672-683).

## ARGUMENT.

### I.

**There was no jurisdiction for the decree; because plaintiff's claim is not a "debt" within the meaning of the Trading-with-the-Enemy Act.**

(*N. B.: As stated, the italics throughout this brief are ours unless otherwise indicated.*)

The suit is based upon the Trading-with-the Enemy Act. If Section 9 thereof was not intended to

include contract claims for damages, then the District Court was without jurisdiction to entertain this suit, and the Circuit Court of Appeals should have reversed the decree and directed a dismissal of the bill of complaint.

The learned Appellate Court wrote an elaborate opinion upon the question of jurisdiction. The most striking thing about this opinion is that it ignores the outstanding fact about the statute under discussion. If Congress had intended by Section 9 to cover unliquidated claims for damages arising upon breaches of executory contracts, it could have so easily have said so. But Congress has not done this, although the statute is most evidently drawn with care and accuracy.

If the national legislature had desired the Alien Property Custodian or the President to inquire into the complicated questions which arise when an executory contract is claimed to have been violated, if it had wanted the Custodian to act as attorney for Germans in defending suits arising upon breaches of contracts to buy or to sell, it would have been such a simple matter to have inserted in Section 9 some few words such as "claims," "contractual liabilities," "claims for damages based upon contracts," or the like. But no such words appear.

The word "debt," appears in Section 9 in close juxtaposition with the phrase "interest, right, or title in any money or property." In order to avoid the necessity of dismissing this suit, the Circuit Court of Appeals was obliged to hold that plaintiff's unliqui-

dated claim for damages for breach of the alleged executory "contract" of sale was a "debt" within the meaning of the "Trading-with-the-Enemy Act." The first part of our argument, therefore, must be an analysis of the reasons given and the authorities cited by that Court in reaching such conclusion, which we think we can demonstrate to be erroneous.

The precise question presented and decided is novel. The meaning of the word "debt," as used in Section 9 of this particular statute, has not been passed upon often, and never before this decision by any other appellate tribunal. The Circuit Court of Appeals devoted to the question six long paragraphs of its opinion. It cited a large number of cases; but *none* of them had to do with the meaning of the word "debt" as used in the act under consideration. It completely ignored, however, the recent and well-reasoned opinion of Judge Westenhaver, in *W. S. Tyler Co.* v. *Alien Property Custodian, infra,* where it was held that Congress did not intend unliquidated claims for damages to be recovered as "debts" under Section 9.

The Second Circuit Court of Appeals, in our case, adopted a line of reasoning which may be fairly paraphrased and summarized as follows:

> The question, of course, is with what intent Congress used the word "debt" when enacting the Trading-with-the-Enemy Act. (1) In deciding this question, the meaning with which Congress used the word "debt" in the *Bankruptcy Act* is entitled to great weight. (2) It

is also very helpful and important to consider the meaning with which, it has been held that various State legislatures used the word "debt" when enacting (a) attachment statutes, (b) corporation laws, (c) set-off statutes, (d) acts relating to fraudulent conveyances, and (e) probate laws. It appears that the word "debt" has, in many such laws, been interpreted to cover claims for unliquidated damages for breach of contract. Furthermore, (3) plaintiff's claim is such as would be a basis for a common-law action of debt. Therefore, plaintiff's claim is one which Congress intended to be covered by the word "debt" when enacting section 9 of the Trading-with-the Enemy Act.

With all due respect, we submit that such reasoning is unsound. We maintain that the learned court's opinion is erroneous, because:

(A) Its method of approaching the question violates a well-settled principle of statutory construction;

(B) It is based upon authorities, which are not relevant (and some of which do not even decide or pass upon the points for which they are cited); and

(C) Its proposition about the common-law action of debt is wrong.

After having dealt with the foregoing subtopics we will discuss (D) our own view, viz: There is nothing in the Trading-with-the-Enemy Act indicating any Congressional intention to cover claims for unliquidated damages, but, on the contrary, the word "debt" was used in its strict common-law sense.

(A) *The Circuit Court's method of approaching the question, of the meaning of the word "debt," was incorrect and contrary to settled principles of statutory construction.*

The Circuit Court of Appeals, as far as the opinion discloses, started out without noticing the presumption that the word "debt" had been used in this statute in its ordinary common-law meaning. The opinion begins by citing and relying upon cases which interpreted the word in strikingly dissimilar statutes, not at all in pari materia. It thereby violates the

> familiar rule of construction that when the statute uses words which have a definite and well-known meaning at common law, it will be *presumed* that the terms were used in the sense in which they were used at common law, *and they will be so construed unless it clearly* appears that it was *not* so intended. 25 *Ruling Case Law* 994.

In *Potter's Dwarris on Statutes and Constitutions* 199, we find the rule stated as follows:

> It is a rule of construction, founded in reason and supported by many authorities, that words in a will or statute, are to be construed according to their strict and proper acceptation, unless there be something to show that such a construction is not intended. *Words of known legal import are to be considered as having been used in their technical sense*, or according to their strict acceptation, unless there appear a manifest intention of using them in their popular sense.

Under the rule referred to, the correct manner of determining the intent of such a word as "debt" in any statute is first to *presume* that it was used in its definite common-law sense and next to examine the statute in question (with due consideration to authorities interpreting the word under *similar* statutes), in order to discover whether there is anything in the context, or in the nature or purpose of the statute, which would lead to the conclusion that the word has been used in some different sense than at common law.

For further authority in support of this method of construction, one need only examine the first few cases cited and relied upon by the Circuit Court of Appeals. In each of those cases the method outlined above was followed by those courts in arriving at their respective decisions as to the meaning of the word "debt" in the statutes before them.

In *Fisher* v. *Consequa*, 9 Fed. Cas. 4816, which is the first authority cited by the Court of Appeals (and also quoted from by it), Mr. Justice Washington had to determine the meaning of the word "debt" as used in a Pennsylvania attachment statute. He did *not* inquire into what meaning the word had been given under dissimilar acts of the Legislature of Pennsylvania or other states. Instead, he commenced with the common-law meaning of "debt" and then examined the *purpose* and *wording* of the statute under consideration (with a view to local precedents thereunder). He gave great weight to the circumstance that the statute was remedial and hence to be liberally construed.

The same regard to principles of construction and to the method called for by them was displayed in the case of *New Haven Co.* v. *Fowler*, 28 Conn. 103, the second authority cited by the Circuit Court of Appeals. As a warning against the erroneous conclusions which may be reached by merely considering how other courts have defined "debt" in construing *different* statutes, the following language is forceful (28 Conn. at pp. 107–8):

> What then is the meaning of the words "creditor" *and "debtor" as used in this statute? They are undoubtedly words having different meanings, depending upon the connection in which they are used; so that nothing very satisfactory can result from resorting to mere definitions of the words themselves, or to cases in which they have been restricted in meaning to a narrow and strictly technical sense, or in which they have been held to be used in a more popular sense.*

In the case of *Frederick L. Grant Shoe Co.*, 130 Fed. 881, the first bankruptcy authority cited, the inquiry of the court, in determining what "debt" should be held to cover, was directed to an *examination* of the *purpose* of the bankruptcy act. (See p. 882.)

In *Mill Dam Foundry* v. *Hovey*, 38 Mass. 417, not a word appears about the meaning given "debt" in statutes other than the corporation law there under construction. That statute was examined and its "manifest object" was found to be a special one

having to do with broad publicity. It was only with due regard to such statutory purpose that the court said:

> * * * though a question was made, whether such a claim for unliquidated damages is a debt, *within the meaning of the statute,* we do not think it admits of a reasonable doubt that all such claims for damages were intended to be included in the term "debts."

The applicable rule of statutory construction really amounts to little more than presuming that a legislature knows how to use words having a definite legal import in a correct manner, unless something to the contrary appears. That well-settled principle was apparently ignored by the learned Circuit Court of Appeals, although it had been given due consideration in the very authorities upon which that Court placed reliance. Its application to the statute under consideration would, we submit, have led to a different conclusion, and it certainly should have been considered in order to arrive at a correct interpretation.

(B) *The decisions cited by the Circuit Court of Appeals interpreting the word "debt" are of no value as precedents here, because of the dissimilarity of the statutes whereunder those cases were decided.*

In the *attachment* statute considered in *Fisher* v. *Consequa*, supra, the common-law meaning of the word "debt" was extended largely because of the remedial character of the attachment act, as an inspection of the opinion will indicate.

The report of *Showen* v. *J. L. Owen Co.*, 158 Mich. 321, 122 N. W. 640, also cited by the Court of Appeals, does not contain the wording of the attachment statute there considered; but the opinion states that, at all events, the court did not need to decide whether the plaintiff's claim was a "debt" in order to hold that it was covered by the statute. In regard to the general purpose of attachment statutes it is said in *6 Corpus Juris, 33, 34:* ?

> Originally the purpose of the attachment laws seems to have been simply to compel the appearance of a debtor over whose person jurisdiction could not be obtained by ordinary process, but at an early date the remedy was generally extended by statute so as to serve the double purpose of compelling defendant's appearance and securing to plaintiff the benefit of such judgment as he might recover, and under the present statutes, in most jurisdictions, the chief purpose served by the remedy is to secure a contingent lien on defendant's property until plaintiff can, by appropriate proceedings, obtain a judgment and have such property applied to its satisfaction.

The general purpose of the Trading-with-the-Enemy Act was undoubtedly to prevent all commercial dealings with enemies or their allies and to punish those who had such dealings. The object of inserting Section 9 and burdening the President and the Alien Property Custodian with payment of "debts" or defending suits will be discussed more fully *infra;* but it is unnecessary to point out that

the principal purpose of attachment statutes and the principal purpose of the Trading-with-the-Enemy Act, respectively, are far different.

The purpose of the *bankruptcy* act is also quite dissimilar, as is shown by the opinion in *Re Frederick L. Grant Shoe Co., supra.* See especially the remarks of the court in 130 Federal Reporter, at page 882.

This Court has defined the purpose of the bankruptcy act in *Central Trust Co.* v. *Chicago Auditorium*, 240 U. S. 581 (another case cited by the Court of Appeals), at pages 591–2, where it was said:

> It is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, 554. Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the Act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for non-performance in the future, although without the property or credit often necessary to enable them to perform.

No such reasons can be urged for giving Section 9 of the Trading-with-the-Enemy Act such a comprehensive interpretation.

Turning to the precedents construing various *corporation laws*, the early Massachusetts case of *Mill Dam Foundry* v. *Hovey, supra,* appears to have involved a statute requiring a statement of the assets and "debts" of each corporation to be made public. In order to make the requirement effectual, it was provided that stockholders should be held responsible for all corporate "debts and contracts" if such publication were not made. The "manifest object" of the statute was found by the court to have been broad public information, and, in view of the wording and purpose of the act, it was clear that "all debts and contracts" merely meant "liabilities," which, of course, would include unliquidated damages for breach of an executory contract.

In *Proctor-Gamble Co.* v. *Warren Cotton Oil Co.*, 180 Fed. 543, also cited by the Court of Appeals, the corporation statute contained the words "all debts." The word "all" was held to be very significant in determining what was meant by "debts," in view of the purpose of the statute. The reasoning of the court stressed the object of the statute. The court said, at pages 547–8:

> It will be noted that in each of the acts the words used are "all debts" thus indicating that the intention of the lawmaking body was to include every liability arising upon contract as distinguished from those arising from torts. The object of the Legislature, no doubt, was to have publicity of the financial standing of the corporation and the names of its stockholders. The mischief then existing,

> and which it was sought to remedy, was that insolvent corporations would often hold themselves out to the world as being companies of large capital and means, and thus obtain extensive credits, when, in fact, they were wholly insolvent. By requiring these statements to be filed and recorded, and which by section 858, Kirby's Dig., are required to be made under oath, persons intending to deal with a corporation could examine these statements * * *.

The cases of *McLean Co.* v. *Butler Co.*, 227 Fed. 325 and *Penn. Steel Co.* v. *N. Y. City R. R.*, 198 Fed. 721, although cited by the learned court below, do not involve in any way the interpretation of the word "debt" as used in statutes or otherwise. Those two cases related to what sort of claims should be allowed in *equity receiverships;* and, as the latter case pointed out (p. 740, footnote), a receiver is under a duty to reach out and take in every conceivable asset, and should, therefore, be required to include in his distribution those "who suffered from breaches of contract."

In *Atlas Bank* v. *Nahant Bank*, 44 Mass. 581, likewise cited below, the claims were clearly for liqiudated sums, being based upon bank bills. No question whether an unliquidated claim for damages constitutes a "debt" was passed upon or considered.

None of the three cases relating to *set-off statutes* support the proposition that unliquidated claims for damages are "debts." *Jackson* v. *Bell*, 31 N. J. Eq. 554, *Baum* v. *Tompkin*, 110 Pa. St. 569, 1 Atl. 535,

and *Tompkins* v. *Augusta Etc. R. Co.*, 102 Ga. 436, 30 S. E. 992, cited for that proposition, all hold to the contrary and contain common-law definitions of "debt" to the effect that the word does not embrace an unliquidated claim for damages for breach of an executory contract.

The *probate* statute under consideration in *Johnson* v. *Garner*, 233 Fed. 756, was drafted with the use of very comprehensive language. The wording of that statute, which almost compelled the view that it included a contract claim for damages, is shown by the following quotation (from page 767):

> The debts of the estate shall be paid in the following order: First, funeral expenses; second, the expenses of the last sickness; third, debts having preference by the laws of the United States; fourth, judgments rendered against the deceased in his lifetime and mortgages in order of their date; fifth, all other demands against the estate.
>
> The term "debt" as used in the statute signifies no more than a sum of money owing on a contract, express or implied * * *.

It might well be that, under a statute directed against *fraudulent conveyances*, one who has an unliquidated contract claim for damages might be considered a creditor, as was decided in *Woodbury* v. *Sparrell*, 167 Mass. 426, 73 N. E. 547. To protect an innocent person against fraud, a court of equity may very well give a liberal interpretation to a statute *aimed at fraud*. But there is no such reason or neces-

sity for stretching the meaning of the word "debts" as used in Section 9 of the Trading-with-the-Enemy Act.

We submit that it was wholly illogical and incorrect herein to give this word a broader meaning than it ever possessed at common law, merely because unliquidated claims have been held to be covered by the word in cases arising under various statutory enactments differing strikingly in nature, wording and purpose from the statute involved in this suit.

(C) *A claim for general damages for breach of an executory contract is not a "debt" at common law.*

Of course, all of the foregoing discussion would be beside the point *if* an unliquidated claim for damages for nonperformance of an executory contract constituted a "debt" at common law, as the Circuit Court of Appeals went on to hold. We submit, however, that in so holding that learned Court again fell into error.

As to the four cases relied upon by the Circuit Court of Appeals in this connection, it should be noted that *not one of them* decided that a claim for damages arising from breach of an executory contract is a common law "debt", and not one of them even contains a dictum stating in so many words that such a claim is a "debt" at common law.

The first authority so cited, *Pratt et al.* v. *Auto Spring Repairer Co.,* 196 Fed. 495, does contain a statement that a claim of the nature under discussion is "practically a liquidated amount," but it is merely another case arising under the Bankruptcy law, and

emphasis given to the fact the word is ascertain.

it does not define or attempt to define what constituted a debt at common law.

*Chicago, Etc. Co.* v. *Clark*, 92 Fed. 968, cited and bracketed with the *Auto Spring Repairer Co.* case, *supra*, does not even go as far as the last-mentioned case. The opinion, however, does contain a very full discussion of what constitutes a liquidated amount, the court being required to settle that question in deciding whether there was any consideration for a release set up by defendant. The Court's definition and test for determining when an amount is liquidated, tends strongly to show that the claim of the plaintiff in the case at bar is to be deemed *un*liquidated. It was said (92 Fed. at p. 976):

> *The rule might be more accurately stated: "Payment by a debtor of a liquidated amount, presently due, and to which he has no defense that can be urged in good faith or with color of right, is not, by itself, a sufficient consideration to sustain a release* by the creditor of other unliquidated claims against the debtor." Of course, it makes no difference that eventually it turns out that some supposed legal defense of the debtor is held to be insufficient. *If he is in a position to litigate in good faith, and* with some color of right, *and gives up his right to throw the claim into court, he gives a valuable consideration* for any settlement, *and no claim to which such a defense may be interposed can be fairly called a "liquidated claim,"* even to the extent to which the debtor may have theretofore expressed his willingness to pay. "If it appears that the claim furnished

> opportunity for controversy, although a favorable result could not have been safely predicted, * * * sufficiency of consideration would be established." *Zoebisch* v. *Von Minden* (1890), 120 N. Y. 406, 24 N. E. 795.

*United States* v. *Colt*, 25 Fed. Cas. 14839, p. 581, is very valuable for its lengthy and learned discussion of what constitutes a debt at common law. Far from deciding that an unliquidated claim for damages for nonperformance of an executory contract could be deemed a "debt," the opinion does not mention a claim of such nature, among the numerous examples it gives of cases where debt would lie. The case before Circuit Justice Washington is described thus:

> an action of debt, brought upon an embargo bond, in the district court, to June, 1811; and the declaration demanded twenty thousand dollars, which the defendant was alleged to owe and detain. It then recited the embargo law, laying the breach, by the defendant: "whereby the United States are entitled to demand a sum, not exceeding twenty thousand dollars, and not less than one thousand dollars, viz. twenty thousand dollars;" which it averred to be due to the plaintiff and detained from them by the defendant. Upon nil debet pleaded, the jury found a verdict for four thousand dollars.

Justice Washington naturally decided that debt was maintainable; but, although his opinion gave numerous instances where an action of debt would lie, none resembled the case at bar. So far as that

*Colt* case is of value in deciding the pending question, it favors the contention of the present appellants; for it contains *dicta* showing that, although debt may be brought where there is a promise to pay a definite sum, or a sum which can be readily computed (such as one-half of plaintiff's expenses in a particular matter), or the value of a *quid pro quo* given (as in actions for goods sold and delivered, or work and labor or use and occupation) nevertheless, *not debt*, but "trespass on the case" was the proper remedy "*to recover general damages for the nonperformance of a contract.*"

The case of *United States* v. *Chamberlin*, 219 U. S. 250, was an action to recover the amount of a stamp tax. All that the case decided was that an action of debt could be brought by the Government to enforce the tax. The fact of liability only, and not the amount, was in dispute. Viewed from this angle, it is quite clear that this Court was not laying down any rule about the proper remedy to recover damages for breach of an executory contract, when it wrote the following short paragraph (part of which only is quoted in the Court of Appeals opinion):

> A tax may or may not be a "debt" under a particular statute, according to the sense in which the word is found to be used. But whether the Government may recover a personal judgment for a tax depends upon the existence of the duty to pay, for the enforcement of which another remedy has not been made exclusive. Whether an action

> of debt is maintainable depends not upon the question who is the plaintiff or in what manner the obligation was incurred, but it lies whenever there is due a sum either certain or readily reduced to certainty. *Stockwell* v. *United States*, 13 Wall. p. 542.

*Mills* v. *Scott*, 99 U. S. 25, likewise cited by the Court below, was an action of debt to enforce the liability of a bank stockholder to pay his *share* of the *bank bills*. The sums due by him were arrived at by very simple computation, and the amount which this Court held to be proper seems to have been virtually undisputed. (See pp. 29–30.) The case, evidently, was not meant to stand for the proposition that unliquidated damages for breach of contract are recoverable in debt. Only three years before, the same justices in *Carroll et al* v. *Green et al*, 92 U. S. 509, a case of like nature where, however, the circumstances were such that the amounts due by the stockholders were *not* so readily computable, said at p. 513:

> The action of debt lies on a statute where it is brought for a sum certain, or where the sum is capable of being readily reduced to a certainty. *It is not sustainable for unliquidated damages.* 1 Cy. Pl. 108, 113; *Stockwell* v. *United States*, 13 Wall. 542.
>
> "The action of debt is in legal contemplation for the recovery of a debt *eo nomine* and *in numero.*" "Case, now usually called assumpsit," is founded on a contract express or implied. 1 Ch. 99; *Metcalf* v. *Robinson*, 2 McLean, 364.

Let us apply these tests to the case in hand. Certainly the amount sought to be recovered was not certain, and could not readily be reduced to certainty; and there was clearly an implied promise on the part of the stockholders. * * *

By taking the stock, the terms were acceded to, the contract became complete, and the stockholders were bound accordingly. * * * The assent thus given and the promise implied are of the essence of the liability sought to be enforced in this proceeding. If a remedy at law were necessary, clearly it must have been *case.*

The foregoing analysis shows that the authorities relied upon by the Circuit Court of Appeals do not sustain its holding that plaintiff's claim constitutes common-law debt, or rather its holding that plaintiff's claim would be a basis for an action of debt. The two propositions are the same. We do not believe that authority is needed for the statement that nothing is a debt at common law which cannot be recovered in an action of debt.

It is unnecessary to go back to the early English authorities, which, of course, would uniformly support our position.

We purpose to show that, according to modern American authorities, even where the remedy of debt had been somewhat broadened, a claim for damages for nonperformance of an executory contract can not be recovered as a debt at common law.

It may be assumed that the two are the same.

Leading textbooks and elementary works are in accord with the foregoing propositions. Thus, in *Burk's Pleading and Practice at Common Law* (1913 ed.) the author says at pages 79–80:

> "The action of debt is designed to recover a specific sum of money due by contract, verbal or written, express or implied, where the amount is either ascertained, or from the nature of the demand is capable of being ascertained, whether due on legal liabilities (as penalties denounced by statute), on simple contracts, or specialties (or obligations under seal), on records (as recognizances, judgments, etc.) or otherwise." "*Its distinguishing and fundamental feature consists in the fact that it lies for the recovery of money or* its equivalent in *sums certain,* or that can readily be rendered certain by actual computation," *while all other actions are for recovery of damages,* or property, or both. It is the only action for the recovery of money, as such, eo nomine et in numero. Anciently the action was largely assimilated with detinue (which lies for the recovery of specific chattels together with damages for their detention), and was freely brought to recover chattels. In modern times this usage has become obsolete, and now debt only lies to recover a specific sum of money.

In 1 *Ruling Case Law*, 335–336, this form of action is discussed as follows:

> The action of debt is a common-law action and lies for the recovery of a fixed and definite

N sum of money or for a sum of money which can be ascertained from fixed data by computation or is capable of being readily reduced to certainty. Unless the plaintiff is entitled to recover a sum of money he cannot maintain an action of debt. It follows that he cannot maintain an action of debt on a note payable in current bank notes. But *the* rule that an *action of debt* only lies if brought for a sum certain or for a sum capable of being readily reduced to certainty *has been subjected to considerable stretching.* Thus it has been held that it is not necessary that a price should be agreed upon for articles sold and delivered before debt could be maintained, provided from the nature of the contract the vendor was to be compensated in money. So debt has been held to lie on a quantum meruit or quantum valebant. *But it does not lie for unliquidated damages.* * * *

Debt will also lie on a specialty, or a simple contract, express or implied, though after *indebtiatus assumpsit* came into use it was rarely resorted to in cases on simple contract. Debt also lies to recover statutory penalties and to recover duties on goods imported into the United States. *The action of debt has been said to differ from an action of assumpsit in that assumpsit is for the recovery of damages for the nonperformance of a parol or simple contract* * * *.

Some rather recent authorities apparently sustain even the ancient rule of the common law, as laid

down in the early cases, and as stated in 3 *Blackstone's Commentaries*, 154, viz:

> The legal acceptation of debt is a sum due by certain and *express* agreement * * * where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it.

A modern case adhering to such a strict view is *Nottingham* v. *Ackiss* (1910), 110 Va. 810, 67 S. E. 351.

However, we only need and intend to demonstrate that a contract claim for damages, such as presented in the case at bar, most certainly is not a "debt" at common law.

In support of the general principles shown above is the case of *Flanagan* v. *The Camden Mutual Insurance Co.*, 25 N. J. L. 506, where the declaration was in debt upon a policy of fire insurance. There had been a total loss. The policy was not a valued policy, although a maximum amount was named, but it contained promises that either the damages were to be ascertained and paid or that the building was to be restored. The breach assigned was that the Company had done neither (p. 517). It was held that debt would not lie, because the action was in reality to recover unliquidated damages. The opinion of the Chief Justice says *inter alia* (pp. 516, 517, 518):

> Although the books appear to confine the action of debt exclusively to policies under seal it is not supposed that, in principle, that

circumstance can affect the form of the remedy. If the nature of the demand be such as to sustain the action, it is immaterial whether the contract be by deed or by parcel, express or implied. *Provided* the certainty of the sum appears, and *the plaintiff is to recover* the sum *in numero*, and *not to be repaid in damages*, the action of debt may be sustained irrespective of the form of the contract. *Buller's* N. P. 167; 1 Chit. Pl. 123–4. Debt will lie against a corporation for the recovery of a debt or sum certain, in all cases where assumpsit will lie. 1 Chit. Pl. 125. The real question is, whether the claim of the plaintiff be for a sum certain, in the nature of a debt, or merely for damages for breach of a contract. * * *

If this be the true meaning of the contract it is a mere contract of indemnity against unliquidated or unascertained damages, for which no action of debt can be maintained, whether the contract be by deed or by parol. The pleader has attempted, in his declaration, to meet this aspect of the contract, for he avers not only that the building was insured for one thousand dollars, and that it was destroyed, but he avers that, by reason of the fire, he sustained damage or loss to the value of one thousand dollars.

The concurring opinion of Potts, J., contains the following (pp. 520, 521):

It is not necessary, however, to look particularly into the declaration in reference to matters of form. The action is misconceived; it should be in assumpsit, not in debt. * * *

> But this being an action upon an open, not a valued policy, though a total loss is alleged, the insured, I repeat, can only recover according to the amount of damage he may be able to prove he has actually sustained. *Rhinelander* v. *Ins. Co. Pa.*, 4 Cranch 44. It is an action brought upon a parol contract for the recovery of unliquidated damages.

*Van Horn* v. *Hamilton*, 5 N. J. L. 477*, involved the breach of a contract whereby defendant had agreed to "receipt" an execution he had against plaintiff, if plaintiff "delivered" to defendant a certain judgment, which plaintiff had recovered against a third party. Plaintiff alleged $50 damages. The court, in holding that plaintiff's claim was not a debt, said:

> If upon this state of demand the plaintiff has any claim he cannot support it in an action of debt. He must recover the damages he has sustained in an action on the case for a breach of contract. Debt, even in the court for the trial of small causes, cannot be brought except upon "a bond or other specialty, note of hand, bill of exchange, book account, or other demand founded on simple contract for the payment of money only." This is not such a contract.

*Weiss* v. *Mauch Chunk Iron Co.*, 58 Pa. 296, was an action of debt in the sum of $88,819.50, brought upon an agreement to form a joint stock company or organize a corporation and take over the real and

personal effects of a certain firm. The value of such effects was to be ascertained by an appraisement, and stock of the corporation to that amount was to be issued to creditors of the firm. The stock was to be held by the company until all the debts were paid, and the then balance of it transferred to the firm. The Court held that an action of debt could not be maintained for the breach of such a contract. The court discussed the question as to when debt would lie, saying:

"The action of debt," says Buller, "is founded upon a contract either express or implied in which the certainty of the sum or duty appears; and the plaintiff is to recover the sum *in numero* and not to be repaired in damages, as it is in those actions which sound only in damages, such as assumpsit," etc.: Buller's Nisi Prius 167.

*State* v. *Harmon*, 15 W. Va. 115, an action upon a *fieri facias* bond, is valuable because of the clearness with which the opinion distinguishes between a claim for general contract damages and a debt. At page 124, the Court said:

The action of *assumpsit* may be defined to be (at common law) an action for the recovery of damages for the nonperformance of a *parol* or *simple* contract, or, in other words, a contract not under seal or of record, circumstances which distinguish this remedy from others; for the *action of debt is*, in legal consideration, *for the recovery of a debt eo nomine* and *in numero*, and is most frequently brought on a deed.

A very able exposition of the more modern view of the common law action of debt is found in *Thompson v. French*, 18 Tenn. (10 Yerg) 452, at pp. 455-6:

> It is not to be denied, that there is some confusion produced in the books relative to the use of this action, by the employment of such terms as "eo nomine," "in numero" and "unliquidated damages." But it is well settled, that although a specific sum must be demanded in the declaration, a less may be recovered, and that although in all cases of goods, wares and merchandise, sold and delivered, and of work and labor done, *where the law implies the promise, because the consideration is executed*, the damages are of necessity unliquidated, yet the action is maintainable. But this confusion is produced either by a loose use of the phrases, or by giving them an improper construction. By "eo nomine," and "in numero" is only meant, that a specific sum is sought to be recovered which is improperly detained, and that the action does *not* sound in damages as does the action of assumpsit *thus drawing the proper line of demarcation* between them, as applicable to contracts of the character under consideration. By the words, "*unliquidated damages*," *is manifestly meant* (if there be any meaning in what is most unquestionably a very loose use of words) *such damages as are sustained by the nonperformance of an executory contract, which cannot be considered as a money demand*, and the amount of which may depend upon such a variety of considerations and circumstances,

as to render it exceedingly difficult to be ascertained. To illustrate it by an example, suppose *a contract for the building of a house, which is not performed*, or performed in a manner different from the contract, *the damages sustained are "unliquidated"* and such as are *not* readily reduced to a certainty, *and* for which *neither indebitatus assumpsit nor debt will lie.* The principle then established by us is this: That in all cases where the consideration has been executed and where there is an express or implied promise to pay in money the value thereof, *indebitatus* assumpsit or debt is the proper remedy. *But that in all those cases, where the consideration is not executed that neither indebitatus assumpsit or debt will lie,* and that the remedy is by a special action on the case.

We believe that even a most exhaustive search of the authorities would not reveal a case at common law deciding that a claim of the nature of this plaintiff's is a debt. Unless the plaintiff has actually furnished some *thing* of value which has been accepted by the defendant, there is no *quid pro quo* upon which to found the "debt." Aside from the exception relating to statutory penalties, every debt not arising upon judgments or contracts to pay a fixed sum of money, must be founded upon a *quid pro quo*. In 1 *Williston on Contracts, 9–10*, it is said:

> A debt might arise (1) upon a judgment or (2) upon a formal contract for the payment of a fixed sum of money, or (3) upon a *quid pro quo* which the debtor had received.

> The *quid pro quo* might be anything which could be regarded as beneficial to the debtor. In early times it was usually a sale, a loan, a lease, or work. *Later, less tangible benefits were held sufficient,* as a release or forbearance, *but mutual promises were insufficient to create mutual debts.*

The claim upon which the plaintiff brought suit herein was unliquidated, being merely a claim for damages for the nonperformance of the executory portion of the alleged agreement. If, after the bill had been filed, the Alien Property Custodian had been authorized to settle the claim for a portion of the amount demanded, a release executed by plaintiff would surely have been binding, without further consideration than the payment to him of the reduced amount. Yet, if it were a liquidated claim or a *debt,* payment of a part only would not be a valid consideration for a release of the whole. See *Chi. M. & St. P. Ry. Co.* v. *Clark, supra,* page 31, *Treat* v. *Price,* 47 Nebr. 875, 66 N. W. 834.

In *Charnley* v. *Sibley* (C. C. A. 7th Cir.), 73 Fed. 980, the claim was for breach of contract to ship to a broker *all* the goods made by defendant and to pay a commission on the resale thereof. In deciding that the claim was unliquidated, in the face of arguments very similar to those advanced on behalf of plaintiff in the case at bar, the Court said at page 982:

> It is contended next that the claim set up in the original notice was not unliquidated, because "it amounts substantially to a breach of

contract of employment where the damages are fixed, certain and definite, and the contract and the law furnish the exact measure of damage." But it is evident that in order to determine the damages in question proof was necessary, first, to establish the contract; second, to show to what extent it had been performed; and third, to prove the damages suffered by reason of nonperformance, including the expense of doing the business incurred, or necessary to be incurred, and kindred matters.

An elaborate trial before a Special Master was required to ascertain the damages herein. How untenable, therefore, is the contention that plaintiff's claim was liquidated, so as to constitute a debt. The plaintiff claims that the resale of the ore liquidated his damages, and that the damages are merely the difference between the contract price and the price received upon the resale. Plaintiff overlooks the fact that the contract price was in itself uncertain; the data upon which the amount must be calculated being different for every carload and every shipment date. There was no fixed amount of ore to be delivered. The agreement provided (Rec. p. 66) that the product covered by it was the total production of zinc ore "shipped" by the seller from its properties in Shasta County, California. Therefore, the first uncertainty as to the price is the amount of ore shipped or tendered, which would have to be determined either by a master as here, or by a jury if the action were brought on the law side of the court. Furthermore, before the purchase price could be

determined, it was necessary that the ore be assayed and analyzed. Here again was data which was not determined, and this data was to be ascertained after delivery. The amount to be paid for the various ingredients of the ore under the provisions of the agreement was fluctuating. For instance, 60 per cent of the contents of silver was to be paid for at the New York price for silver according to the Engineering and Mining Journal on date of shipment. (Rec. p. 67.) Copper was to be paid for as per wet assay less one unit, 20 pounds at the E. & M. J. price for wire bar copper for the E. & M. J.'s week of the date of the bill of lading less 5 cents per pound. (Rec. p. 67.) As to the zinc content, it was provided that the price of spelter to govern should be that quoted in the Engineering and Mining Journal for the week of the date of the bill of lading. One can scarcely imagine more uncertain terms as to the purchase price of any goods than those contained in the present alleged contract.

We submit that all of the foregoing clearly demonstrates that plaintiff's claim was unliquidated; that, being a claim for damages for nonperformance of an executory contract, it was not a "debt" at common law; and that the Court of Appeals erred in holding that it was a common-law "debt."

X an action for "debt" at common law would not lie to recover damages

(D) *The Trading-with-the-Enemy Act does not disclose any affirmative intention on the part of Congress to use the word "debt" other than in its common-law sense.*

In view of the authorities and principles discussed above, we submit that jurisdiction cannot be maintained herein without some affirmative reasoning to show that the word "debt," as used in Section 9 of the Trading-with-the-Enemy Act, was intended by Congress to include claims which are *not* debts at common law. Examination of the act discloses no such intent on the part of Congress. On the contrary, it discloses an intent to use the word only with its common-law significance.

A thorough judicial examination of this act has been made by Judge Westenhaver in the case of the *W. S. Tyler Co.* v. *Alien Property Custodian,* 276 Fed. 134. That was a suit brought to recover from the Alien Property Custodian, out of funds held by the custodian as the property of a German steamship company, damages for breach of contract to carry safely certain goods delivered to the steamship company prior to the War. The goods were lost, and it was for the specific value of the goods that the plaintiff sought to recover. The facts clearly appear from Judge Westenhaver's opinion. The plaintiff alleged the damages to be the actual value of the goods, which consisted of iron netting, presumably with a fixed market value. Judge Westenhaver decided that damages for breach of contract, being unliquidated damages, could not constitute a "debt" within the meaning of section 9 of the Trading-with-the-Enemy Act. He held that the word "debt" comprehended only such claims as those upon which the common-law action of debt

"Debt" will lie for a sum certain

[illegible] the element of [illegible]

could have been maintained. Applying the rule of statutory construction mentioned above (under subhead (A), *supra*,) Judge Westenhaver, among other things, said:

> Counsel for defendants insist that this word must be given its ordinary and usual meaning as has already herein been briefly defined. *This word "debt," it is urged, is found in a statute carefully prepared, presumptively by persons learned in the law and familar with the legal meaning of a debt as distinguished from a mere liability, and that if nothing appears from the context or other provisions of the section or the entire act indicating a broader or different meaning, then the courts in construing and applying the act must adopt its correct legal definition. These arguments appear to be sound.* An examination of original Sec. 9 as amended, as well as the entire act and the several amendments thereto, discloses internal evidence that it was carefully drafted, and in other respects accurate use is made of technical legal terms. *Nothing appears therein tending to enlarge the ordinary meaning of the word "debt."* On the contary, such aid as is thus obtained tends to support the conclusion that it was used with its usual legal signification. Thus par. C, amended Sec. 7, in describing the property of aliens which the President shall seize, uses the following words: "Choses in action and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy." *It furnishes evidence that the draftsmen of the act were familiar with and*

*knew how to make use of legal terms adequate to describe and include any and all kinds of liabilities owing from one to another as well as mere debts. If this language had been used in Sec. 9 instead of the word "debt" or in addition thereto, no doubt would exist that plaintiff's cause of action was included. The omission of these or similar words after the word "debt" in sec. 9 is therefore entitled to great weight.*

Furthermore, par. F, amended sec. 9, repeating a provision of original sec. 9, is not without weight. It is, "Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court." Here again we find a number of technical legal terms clearly and accurately used and definitely and specifically expressing the thought the draftsmen of the act had in mind. They are typical of the skill with which use is made of legal terms throughout the entire act. This provision expressly limits rights and remedies of persons having debts, claims, demands, or liabilities against alien enemies, so that except as a right or remedy is conferred by the preceding provisions of sec. 9, all such persons are without right or remedy. They are remitted either to the common-law remedies such as exist during or after the end of the war between citizens of separate and independent States or to such redress as the President and Senate in negotiating a treaty of

peace, or Congress in disposing of seized property and funds, may in their sound discretion see fit to provide.

*Upon careful reflection I am of opinion that the word "debt" is used in sec. 9 with its usual and definite legal meaning. It should and must be thus construed unless from the context or some other part of the act a different and broader meaning appears to have been given it. This does not so appear.* On the contrary, upon a consideration of the context and of all the provisions of the act it appears that it was the intention of Congress to confine and limit the word to its usual and ordinary legal meaning. * * *

*Sound reasons exist why Congress should have been willing to authorize the President to pay liabilities, the amount of which was fixed and certain, and neither the obligation to pay on the part of the alien enemy nor the amount thus to be paid depended upon extraneous evidence or circumstances requiring a decision both as to liability and amount upon conflicting evidence, and should have denied the power and withheld the burden when they did.* Congress in its wisdom would seem to have decided that it was not wise in the latter case either to vest this power in the President or to burden him with the performance of this difficult duty. The right to sue depends upon the President's failure or refusal to order payment. The right of suit in the event of such failure or refusal is no broader or different as respects the nature of the claimant's demand than is the power and duty vested in the President.

We submit that *this reasoning is unanswerable.* We further submit that Congress had a definite purpose and policy in mind in providing only for the recovery of "debts" and of claims of rights to, or title in, money or other property assigned, conveyed or transferred to the Alien Property Custodian. (See section 9.) Taking the common-law idea of a debt, viz., a specified sum of money owned by the creditor and detained from him by the debtor (see *1 Williston on Contracts*, sec. 11)—*all these claims, the recovery of which the section authorizes, fall virtually into the same class.* They are all claims wherein *only the fact of liability* needs to be determined. If a nonenemy had a claim of title to a parcel of real estate, or to a bond, the only fact upon which the President (or court) would have to pass is the fact of liability; there would be no dispute as to the amount involved. Similarly, the *fact of liability* is *all* that would have to be passed upon in a case involving a typical common-law debt; for example, an instrument calling for the payment of a fixed sum of money. The common law of debt has grown to include claims for goods sold and delivered, claims upon instruments promising to pay one-half the expenses to be incurred in regard to a definite matter, and claims by the Government to recover a stamp tax or fixed penalties. But this is no justification or reason for holding, as did the Circuit Court of Appeals, that the word "debt" in this statute should be extended *beyond* its broadest common-law meaning, so as to include a claim for damages for nonperformance of

an executory contract. The plaintiff's claim not only involved the decision of complicated questions to determine the fact of liability, but after such fact had been decided, required so many facts to be considered to determine the amount involved that a Special Master was appointed to assess the "*damages* which the plaintiff has suffered *by reason of the failure and refusal* of said defendant to *receive*, accept, and pay for said ore." (Record, p. 63.)

The Court of Appeals opinion contains a remark to the effect that the learned Judges did not believe that Congress could have meant that the fact of liability should be determined without determining the amount thereof. We submit that Congress, as far as claims for damages for nonperformance of an executory contract are concerned, meant that *neither* the fact, nor the amount, of liability should be determined. Were the Alien Property Custodian subjected to suits upon claims of every kind, character, and description, arising out of executory contracts, the final determination of litigation under this war-time statute would be interminably extended. If suits to recover unliquidated and uncertain damages are permitted, the custodian must be prepared to defend suits concerning which he has no means whatsoever of ascertaining the real amount.

It is to be borne in mind that Section 9 provides that not only may a suit be brought for a "debt" but that application for executive allowance may be made. If "debt" includes all manner of contract claims for damages, then the President must be pre-

pared to pass upon large quantities of evidence to establish the amounts of damages to be awarded. It is not to be assumed that Congress intended to place a burden of this character upon the Executive. And, if the President may not go into such matters, neither may a court; since a suit for debt is provided for by the use of the same words as in the provisions for executive allowance.

## II.

**The alleged contract involved herein is lacking in mutuality and void for want of consideration and for indefiniteness.**

The "contract" is printed as Exhibit B annexed to the Second Amended Bill of Complaint at pages 49–52 of the Transcript of Record, and is reprinted in the Master's Report at pages 65–69. The only consideration mentioned in it is recited as follows:

> That for and in consideration of the sum of one dollar ($1) each to the other in hand paid by the parties hereto and the mutual terms and agreements herein contained the seller agrees to sell and deliver and the buyer agrees to purchase and receive the product hereinafter specified upon the terms and conditions hereinafter set forth.
>
> *The product covered by this contract is the total production of zinc crude ore shipped by the seller from its properties in Shasta County, California*. (Record, p. 66.)

The courts below correctly refused to regard this recital of the exchange of "one dollar" as a valid

consideration. The interchange of a dollar is clearly insufficient. *Velie Motor Car Co.* v. *Kopmeier Motor Car Co.*, 194 Fed. 324, 331, 114 C. C. A. 291; *Hall* v. *Allfree et al.*, 99 N. E. 813 (Ind. App. Ct. 1912); 1 *Williston on Contracts*, section 115, p. 241.

Therefore, in order to determine what the parties promised, we need only to consider the italicized portion of the above quotation.

(A) *The promise as disclosed by the contract and how the same has been misconstrued.*

The outstanding fact is that, on the seller's side, the promise was conditional and dependent upon matters within its own volition. The seller did not promise to do any mining and did not even promise to sell to Beer, Sondheimer and Company the total production of its mine. It promised only so much thereof as might be *shipped* by it *from* its properties in Shasta County, California. But in holding that this "contract" was valid, on the ground that it called for the total production of the mine, both the District Court and the Circuit Court of Appeals failed to give any meaning to the words "shipped from," which, we submit, are the very crux of the matter.

The District Court said (Rec. p. 60): "Defendants' contention that the clause of the agreement 'shipped from its properties,' contemplated a literal shipping rather than a mere delivery, does not impress me." The Circuit Court of Appeals did not even mention the words "shipped from" but said (p. 664): "By the contract the Mammoth Company promised to sell, and Beer, Sondheimer and Company promised to buy

* * * the *total production* * * * of a specified mine." Reasoning from this erroneous premise, the court unconsciously rewrote the agreement by saying a little further on in its opinion that "*when the quantity is measured by the output,* the Mammoth Company could not, without violating its contract, have escaped producing and delivering the ore."

Unless the words "shipped from" are completely disregarded, the "quantity" called for by this contract is *not* "measured by the output" of the mine, but only by as much thereof as the seller *might* ship. The wording of the contract was clearly designed to allow the seller to mine or produce ore and still refrain from shipping it; since the subject matter is not the total production, but only the total "*shipped*" by it "*from*" its properties. If after mining a quantity of ore, the seller found the contract prices unfavorable, it could hold the ore unshipped, without breaking any promise or giving the buyer any remedy. Perhaps it might have sold the ore *at the mine* to its affiliated corporation, the United States Smelting Co. (Rec. p. 166), for delivery by the latter under a prior contract, which it had made, to sell this very ore to the American Metal Co.

That the Mammoth Company itself interpreted this alleged contract, which it had prepared, to mean that it was under *no* obligation to ship all the ore produced, is shown by the telegrams sent to Beer, Sondheimer & Company by Metcalfe, its mine manager. Metcalfe was the individual who had charge of all ore shipments, and he testified that no ore was

ever shipped without his authority or consent. (Record, p. 155.) In his telegrams (printed, *supra*, pp. 9, 10) he stated that shipments of zinc ore depended altogether on the market price of spelter and that, when spelter quotations were low, shipments would be very light.

This unequivocal showing, that the mining company did not consider itself bound to ship any quantity whatsoever, surely ought to have been given weight by the court below on the question of what the agreement was. We submit that there is no good reason for disregarding such facts.

The primary rule in construction of contracts is that the courts should, if possible, ascertain and give effect to the mutual intention of the parties; and, as was said in *Insurance Co.* v. *Dutcher*, 95 U. S. 269, 273:

> The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done.

That the Mammoth Company did not obligate itself to ship any ore is further shown by the clause defining the period of the agreement, set forth on page 49, of the Transcript. The period of the "contract," although having an outside limitation of 18 months, was primarily agreed to be "one year from the date of the first *shipment* made *after the completion of the picking plant* which *the seller*

*contemplates* building." The use of the word "shipment" is unnecessary unless what the parties were contracting for were shipments, or the amount shipped, rather than the total production of the mine. The seller's obligation was, therefore, dependent, not merely on the seller's own inclination as to how much it would mine and the seller's subsequent volition as to shipping the "product," but also on the seller's own choice as to how long it might take about building or refraining from building the "picking plant." This building was merely contemplated, and there was no promise that it would ever be completed or even started. In short, the most that can fairly be held is that the seller promised that all the *shipments* it made of ore produced at its mine, after it had completed a "contemplated picking plant," were to go to Beer, Sondheimer & Co., without obligating itself, however, to make any shipments.

(B) *The Authorities relied upon by the Circuit Court of Appeals.*

We gather that the first case directly relied upon by the Court below is *Transcontinental Petroleum Co.* v. *Interocean Oil Co.*, 262 Fed. 278.

We do not believe that, by the remarks concerning *Grimwood* v. *Munson S. S. Line*, 249 Fed. 728, 273 Fed. 166, the Circuit Court of Appeals meant to do more than attempt to distinguish that case. The remarks can not amount to a holding that the defense of lack of mutuality was not available to the defendants-appellants; for immediately thereafter the

learned court went into a discussion of the question of mutuality.

But no matter what its remarks might be taken to mean, the learned appellate court was seriously mistaken, when it stated that nothing had been said by the defendants about lack of mutuality until the appeal. Lack of mutuality was indicated as a reason for refusal to take further shipments in Beer-Sondheimer's letter of April 6, 1915 (Rec. p. 615, supra, p. 12), was raised by the pleadings (Rec. p. 55) and was argued so fully before the trial court that it was apparently regarded as the principal ground of defense, and devoted to it three pages or more of his written opinion. (Rec. pp. 58–60.)

Furthermore, as sufficiently appears from our discussion under subhead "D" *infra*, the *Grimwood* case or cases did not *hold* that a defense of nonmutuality can not be raised by a defendant who failed to assert it before suit brought. The final decision of that litigation was in favor of the defendant, on that very defense.

Before comparing the facts presented by the above-mentioned *Transcontinental Petroleum Co.* case, with those shown by the Record in this one, it is well to bear in mind that the Mammoth Company had no regularly established zinc ore output and no picking plant when the contract was executed.( Record, pp. 140, 121.)

In the *Transcontinental* case, the contract called for 1,200,000 barrels of Mexican Crude Oil "provided that deliveries in said quantity or in any quantity

are limited to the actual production of the oil wells owned by the vendor." At the time of its execution, the vendor had twenty flowing oil wells in operation. It was an established concern with a known output or production. In view of that fact (which is conspicuously absent from the case at bar), it is not so difficult to see why the Court, in construing the contract in the *Transcontinental* case, held that the company was obligated "to deliver the *entire output* up to the quantity specified." Furthermore, the oil wells of the Transcontinental Company were *flowing;* no labor was required to *extract* oil. In view of this, it is far more natural and reasonable to hold that the contract imposed the *negative* duty not to "cap its wells and choke their production."

In the case at bar, it must be *implied* that plaintiff promised to do various *affirmative* acts not expressed in the agreement, namely, (1) to produce zinc ore; (2) to build its picking plant; (3) to put *all* the ore it produced through the picking plant; and (4) to *ship all* the zinc ore that it produced. Although there was testimony to the effect that business reasons would incline the Mammoth Company to keep on producing ore (Record, p. 153), there was *no proof* that the Mammoth Company had, for business reasons, to *ship* any of it.

The *Transcontinental Petroleum* case is not valuable as a precedent here, because our case lacks the facts which that case held to be "vital" to imposing liability. Indeed, we submit that the case at bar presents one of the instances mentioned in the opinion

in the *Transcontinental case*, where such a "personal choice" was given to "withhold or refuse" shipments of the ore produced as is "held to destroy the mutuality of contract obligations." The facts of the instant case require the application of the rule (also noted in the case cited) that "when the quantity to be delivered * * under a contract of sale rests in the uncontrolled will or desire of one of the parties, mutuality is lacking."

The Circuit Court of Appeals also relied upon the "requirement contract" cases of *Marx* v. *American Malting Co.*, 169 Fed. 582, *Texas Co.* v. *Pensacola Maritime Corporation*, 279 Fed. 19, and *Pittsburgh Plate Glass Co.* v. *H. Neuer Glass Co.*, 253 Fed. 161. As the agreement involved in this suit is not a requirement contract, cases of that kind are relevant only by analogy to "total production" contracts. (See *Marx* case, *supra*, pp. 583–4.) But one of the questions here presented is whether the alleged contract did *obligate* the Mammoth Company to sell to Beer, Sondheimer & Company the *total* 33% zinc *output* of its mine. In the *Marx* case the analogy to "total production" contracts appears to be sound on the facts there presented, because the contract in that case called for "*all* their [Plaintiffs'] requirements up to Dec. 31, 1907." The evidence in the *Marx* case disclosed that the parties had had prior business dealings and that, although plaintiffs' plant had been considerably enlarged, nevertheless the defendant had received notice of that fact when it entered into the contract. Considering the new addi-

tions in connection with the previous requirements of the plaintiffs' old plant, the quantity needed could be calculated with reasonable certainty.

The requirement contract involved in *Texas Co.* v. *Pensacola Maritime Corporation, supra,* called for "*all* of the bunker oil sold by the purchaser to vessels in the port of Pensacola," fixing *maximum limits* beyond which the seller could not be called upon to deliver. There was no question, therefore, whether or not the promises contained nullifying reservations, but rather whether the amount called for could be held to be reasonably certain. There is nothing in the opinion which questions or contradicts the rule that "when the quantity to be delivered under a contract of sale *rests in the uncontrolled will* of one of the parties, mutuality is lacking."

In *Pittsburgh Plate Glass Co.* v. *H. Neuer Glass Co., supra,* the agreement was evidenced by a letter in which defendant stated that it had entered *plaintiff's* order for polished plate glass for anything defendant *could* furnish from its warehouse until the following June 30th. The court held that the contract bound plaintiff to buy *all* the glass which defendant should actually in good faith have in its warehouse during the period; but the court stated that, if plaintiff had only been obligated to buy such glass as it saw fit to take, the contract would lack mutuality. Defendant there had promised to sell whatever it *could* furnish from its warehouse. If the Mammoth Company had promised to sell all the zinc ore which it *could* ship from its properties, then, possibly, the

cited case would be a precedent for holding the contract mutual and binding. But see *Hazelhurst Lumber Co.* v. *Mercantile Lumber & Supply Co.*, 166 Fed. 191, discussed, *infra*. However, an agreement where plaintiff even went as far as to promise to sell *all* that it *could* produce not before the Court.

(C) *The option on the less valuable ore and the implied promise not to ship 33% ore to third parties are not to be considered as the consideration.*

The Circuit Court of Appeals apparently considered that the "promised option given Beer, Sondheimer & Company to purchase all the other grade zinc ores which the Mammoth Company might produce * * * was sufficient consideration," citing *Munson S. S. Line* v. *Grimwood*, 273 Fed. 166, and *Ramey Lumber Co.* v. *Schroeder Lumber Co.*, 237 Fed. 39. (Rec. p. 665.) The first of the two cases thus cited not only does not stand for the proposition, but is a case wherein the Second Circuit Court of Appeals itself expressly disagreed with the inference from the second cited case.

The opinion written in the *Grimwood* case, as reported in 273 Fed. 166 (*sub nomine Grimwood* v. *Munson S. S. Line*) does not contain a word to the effect that a "promised option" is sufficient consideration; and the prior opinion entitled *Munson S. S. Line* v. *Grimwood*, which appears in 249 Fed. 722, contains only the following on the subject (p. 725):

> In so far as the language of decision in *Ramey, etc., Co.* v. *Schroeder, etc., Co.*, 237 Fed. 39, 150 C. C. A. 241, seems to assert that an

> agreement otherwise void, as depending for effect on the will, wish, want or whim of one party, is validated merely by the promise of such party to abstain from dealing in respect of the subject in hand, with any person other than the second party, *we are compelled* to think it inadvertently used, and *to disagree.*

But even the *Ramey* case can not be said to hold that an option given under such circumstances as that in the case at bar is good consideration for the buyer's promise to take all that the seller might ship from its property. No option, whether given collaterally or otherwise, appears to have been involved in that action. The *Ramey* case merely holds that where a vendor has promised to sell *all* (of his particular product) which he may manufacture or acquire, and the vendee has promised to buy the same, the consideration for the vendee's promise is found in the restriction which the vendor has placed upon himself; that is, the implied promise that he will not sell to anyone else but the vendee. Without discussing, at present, whether this doctrine is correct and applicable herein, we wish to remark that neither case cited for the proposition that the option is the consideration, directly passes upon that question.

To regard the option as the consideration, means construing this alleged contract as being primarily an option agreement; whereby Beer, Sondheimer & Company, in order to secure a "promised option" on less valuable ore, promised to purchase whatever 33% zinc ore the Mammoth Company might choose

to ship from the mine. We submit, with all due respect, that such a construction thereof amounts to a perversion of the whole purport of the writing. The bargain evidenced by the alleged contract was not of that nature. The "contract" clearly purports to be for the purchase and sale of 33% zinc ore. It was not a mere option agreement relative to less valuable ore. It is clear that the supposed promise to sell 33% zinc ore was the thing which Beer, Sondheimer & Company were to receive in exchange for their promise to buy it. The option clause is merely incidental or collateral.

Yet, even if it could be considered that the alleged contract evidences an intention that the promise of the Mammoth Company was to sell its 33% zinc ore *and* to give an option on the rest—and that such promise was to be given in exchange for Beer, Sondheimer's promise to buy the 33% zinc ore—the plaintiff's case is untenable. On such hypothesis Beer, Sondheimer & Company *did not receive what they had bargained for;* because that part of the Mammoth Company's promise which relates to the sale of the 33% zinc ore is illusory and not binding, due to the reservation of the right to choose whether or not it would ship the ore. And even the option on the less than 33% ore is illusory; because there was no ore being mined or produced, when the option was given, and there was no promise or assurance that the Mammoth Company would ever have any such ore.

It seems necessary at this point, to return to a discussion of *Ramey Lumber Co.* v. *Schroeder*

*Lumber Co., supra.* In that case, as in the *Transcontinental* case, *supra*, several significant facts appear, which are conspicuous by their absence from this Record. In the *Ramey* case, (1) the seller had an established business; (2) the parties had had prior dealings involving "something over a million feet" of lumber and (3) the promise of the seller was not objectionable upon the ground that it was illusory; it was an unequivocal and express promise "to sell *all* the * * * lumber said first party will manufacture or own during the season of 1911" and "to grade and *ship all* the above-named stock."

In view of the wording of its promise, it is apparent that the plaintiff in that case could scarcely have escaped performance without going out of business; whereas the Mammoth Copper Company might have been well content either to postpone its zinc mining or to produce ore without shipping any of it. The Mammoth Company doubtless knew that its *alter ego*, the U. S. Smelting Co., had already contracted to sell all this ore to the American Metal Co. at the mine; and the insertion of the words "shipped from" when defining the subject matter of the alleged contract, may well have been intended to provide a loophole of escape from Beer, Sondheimer & Co. in the event of a demand from the American Metal Co. The "contract," it should be noted, was prepared by Mr. Eardley (Record, p. 175) who was either the agent of the Mammoth Company or of the said U. S. Smelting Co. (Record, pp. 191, 854, 637.) In

the latter event, it is all the more likely that the words "shipped from" were inserted for the purpose suggested above. A draft of the contract was submitted to Beer, Sondheimer & Company, but all that was done by them was to strike out a clause relating to "reshipment of residues." (Record, p. 464) besides the two words "and concentrates." (Record, pp. 122, 460.)

The above-mentioned dissimilarity in the wording of the seller's promise, besides the other differences of fact noted above are sufficient, therefore, to distinguish the *Ramey* case, and to make its rule inapplicable here.

On principle, the rule of the *Ramey* case is unfair. It seizes upon an implied *negative* promise and sets that up as the consideration for the buyer's promise, when, as is apparent from any ordinary *contract of sale*, what the buyer wants is a binding obligation to do something *positive*, that is, *to sell*. In the case at bar, there was no evidence that Beer, Sondheimer & Co. were trying to prevent the sale of the Mammoth Company's ore to anyone else. What the buyers here desired was a binding promise to ship ore—not an agreement to refrain from shipping ore to others, coupled with a reservation by which the supposed seller could produce ore without shipping it—not an agreement whereby shipments of "zinc ore tonnage" would depend altogether on the market price of spelter," as was stated in Metcalf's telegram. (Record, p. 613, Exh. "J.")

The District Court, referring to cases cited by counsel for the present appellants, recognized their general doctrine by mentioning a "class of cases" wherein—

> it has been held that a consideration based upon abstention from dealing is so unreal and so profitless to the buyer that it could never have been intended by the parties, especially where, as here, it was not in literal terms expressed.

And that learned Court added:

> What the buyers particularly wanted of the seller was ore for their smelters, and not an agreement not to ship to others.

That observation completely refutes the argument that the option on the less valuable zinc ore is to be regarded as the consideration for the buyers' undertaking; and strengthens our contention that the wording of the contract shows that it was *not* intended to be the whole consideration which the Mammoth Company was to give in exchange for Beer-Sondheimer's promise.

In short, the seller's volition as to making shipments was left so completely unfettered, and the influences affecting the likelihood of shipments were so completely out of the buyer's control, that this "contract" is a most glaring example of one lacking in definiteness, consideration, and mutuality of obligation.

(D) *Authorities which affirmatively support the proposition that this contract is not valid.*

That the alleged contract should be held void for being dependent "upon the will, wish, want, or whim of one party" is shown by the case of *Munson S. S. Line* v. *Grimwood*, 249 Fed. 722, and the weight of authority. Besides the *Munson Line* case, and the case of *Leach* v. *Kentucky Block Cannel Coal Co.* (*Inc.*), 256 Fed. 686, see especially: *Cold Blast Transp. Co.* v. *Kansas City Bolt & Nut Co.*, 114 Fed. 77, 57 L. R. A. 696; *Hazelhurst Lumber Co.* v. *Mercantile Lumber & Supply Co.*, 166 Fed. 191; *Schlegel Mfg. Co.* v. *Cooper Glue Factory*, 231 N. Y. 459; *Davie* v. *Lumberman's Mining Co.*, 93 Mich. 491, 24 L. R. A. 355; and *Baily* v. *Austrian*, 19 Minn. 535.

In the *Munson Line* case, *supra*, the agreement was to provide transportation for "all of the coal and coke shipped by Grimwood from January, 1913, to December 31, 1920". The second circuit court of appeals reversed a judgment enforcing the agreement and ordered a new trial, because of an erroneous charge as to damages and the absence of evidence as to the extent of Munson's previous knowledge of Grimwood's requirements. The opinion, per Hough, J., added that, if no such offer of proof had been made—

> and the trial court had held the contract a "will, wish, or want" agreement, we should have agreed with such ruling * * *. (249 Fed. 725.)

In the *Leach* case, *supra*, the defendant, the owner of a coal mine, entered into an alleged contract with plaintiff, which the latter summarized as providing, in part, that (256 Fed. 686):

> Plaintiff was to introduce defendant's products in the territory in question, and to sell as much thereof as possible, and in consideration for plaintiff's undertaking defendant agreed to sell to plaintiff for delivery within said territory all coal which plaintiff would order up to twenty-five thousand (25,000) tons per annum, provided plaintiff purchased at least two thousand (2,000) tons of coal per annum, the price which plaintiff was to pay for such coal for the year ending March 31, 1916, to be two dollars ($2.00) per net ton of two thousand pounds free on board cars at the mines.

In deciding, upon demurrer, that no valid contract was set forth, Judge Mayer said, at page 688:

> There is no obligation whatever upon plaintiff to order any coal. If plaintiff had refused or neglected to order coal, defendant would not have had any cause of action against him. This case is not one where one party agrees to supply the requirements of another. * * * the agreement is in principle, in one aspect, within that class of cases which have come to be known as "will, wish, or want" contracts. It is an agreement clearly lacking in mutuality (citing cases).

In any event, because there was no obligation upon plaintiff to order up to 25,000 tons, the case is well within the principle of *Pressed*

*Steel Car Co.* v. *Union Pacific Railroad* (D. C.), 254 Fed. 316, filed December 17, 1918. There is nothing to the contrary in *Munson S. S. Line* v. *Grimwood,* 249 Fed. 722, 161 C. C. A. 632. Indeed, in that case the court indicated in passing its full agreement with the Cold Blast Transp. Co. case supra.

In the *Cold Blast Transp. Co.* case, *supra*, the supposed contract consisted of a written offer and acceptance. The offer was silent as to the amount of the articles called for, though the price was definitely fixed and stated. The case contains an exhaustive analysis of the whole subject in a long opinion per Sanborn, J., writing for the Circuit Court of Appeals for the Eighth Circuit (114 Fed. 79, 80, 81):

> A promise is a good consideration for a promise. But no promise constitutes such a consideration which is not obligatory upon the party promising. It must bind the promisor, so that the promisee may maintain an action for its breach, or it is without legal effect and void.
>
> It is, however, contended that, even if this alleged contract was void in its inception, it became valid and binding upon the parties when the defendant ordered, and the plaintiff delivered and received payment for, a large quantity of the manufactured articles at the prices and in accordance with the terms of the letter of October 27, 1898. * * * The orders for these articles which have been filled by their delivery specified the amounts so delivered, and thus effected contracts for

their sale. But these orders and deliveries have in no way remedied the fatal defect of the offer and acceptance regarding those articles which the defendant has ordered and the plaintiff has refused to deliver. The defendant never agreed to order or to pay for any quantity of these undelivered articles. * * *

It is said that the intention of the parties was to make an agreement that the plaintiff should sell and deliver, and the defendant should buy, all the articles of the character specified in the order which should be needed or required by its business between October 27, 1898, and June 1, 1899 * * *. The answer is that, while ambiguous terms and doubtful stipulations may be interpreted to carry out the intention of the parties when they fairly evidence it, their secret intention can not be imported into contracts whose terms and meaning are plain and unambiguous and do not express it. It is only the intention of the parties which the contract itself expresses that the courts may enforce. * * *

The rules applicable to contracts of this class may be thus briefly stated: A contract for the future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties; but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty. * * *

Tested by these rules, the accepted offer of October 27, 1898, was void in its inception for want of consideration and mutuality.

In the *Hazelhurst Lumber Co.* case, *supra*, Judge Pollack, in the Circuit Court for the Western District of Missouri, said (166 Fed. at p. 192):

> The contract pleaded purports to bind defendant to receive and pay for all ties plaintiff could produce and ship to defendant from October 2, 1907, to January 1, 1908, at the rate of $11.75 per thousand. The number of ties agreed to be furnished by complainant is not stated. By the terms of this contract what obligation did plaintiff assume legally enforceable against it? How many ties could plaintiff have produced? How many ship to defendant? Suppose defendant had sought to force this contract against plaintiff, or to have maintained an action against it for damages for breaching the contract, could it not have answered defendant's demand by admitting the contract to have been made between the parties as stated, but to have further answered, "We could produce no ties within the time specified, or, having produced ties in any amount, we could procure no cars in which to ship them to defendant, or we could not procure men and teams to draw them to a point of shipment, therefore we were not blamable"? Manifestly, such answer would be a complete defense by plaintiff to any demand presented against it by defendant, whether to enforce delivery of ties or by way of damage for breach of agreement. This

> being true, the contract is manifestly void in law for want of mutuality.

The New York Court of Appeals recently expounded the same views in the *Schlegel Manufacturing Co. case, supra,* saying per McLaughlin, J. (231 N. Y. at pp. 460, 461, 462, 463):

> We * * * enter your contract for your requirement of "Special B B" glue for the year 1916, price to be 9c. per lb. * * * Deliveries to be made to you as per your orders during the year and quality same as heretofore. * * *" Unless both parties to a contract are bound, so that either can sue the other for a breach, neither is bound.
>
> There are certain contracts in which mutual promises are implied. * * * In cases of this character, while the quantity of the article contracted to be sold is indefinite, nevertheless there is a certain standard mentioned in the agreement by which such quantity can be determined by an approximately accurate forecast. *In the contract here under consideration there is no standard mentioned by which the quantity of glue to be furnished can be determined with any approximate degree of accuracy.*
>
> The price of glue having risen during the year 1916 from nine to twenty-four cents per pound, it is quite obvious why orders for glue increased correspondingly. Had the price dropped below nine cents it may fairly be inferred such orders would not have been given.

In *Davie* v. *The Lumberman's Co.*, *supra*, a much-cited case, the Michigan Supreme Court, per Durand, J., said in part (24 L. R. A. at pp. 358–359):

> The agreement was simply that the plaintiffs would work at mining the ore in "Cave Pit" for $1.50 per ton as long as they could make it pay. No limitations were put upon their methods, or how or in what manner they should conduct the work in order to make it pay, nor does it give the defendant any voice in deciding upon whether or not the plaintiffs could make it pay, nor does it place the subject of the contract upon any certain basis upon which a jury can lawfully and justly arrive at a fair rule of damages in case of its violation. Under this contract the plaintiffs must be presumed to be the sole judges of whether or not it would pay them to do the work and of how long they should continue it. * * * When a party agrees to sell articles of merchandise, or deliver the productions of his labor to another at a certain price as long as he can make it pay, everyone must clearly understand that the term is dependent on conditions over which the promisee has no control, and in so far as anyone has the power to make the term effective, it is lodged solely in the promisor. * * * This serious element of uncertainty destroys all mutuality in the contract, and gives the promisor full power to say when a further execution of the contract will not be advantageous because he can not make it pay. Contracts can not arise where there is no mutuality, nor can they arise from

> the action of one party alone where the other has no power to prevent his action.

*Baily* v. *Austrian, supra,* is also a leading case in the West. Berry, J., for the court, there said (19 Minn. 537, 538)—

> the engagement of plaintiffs was to purchase all of said pig iron, which they might want in their business during the time specified, but they do not engage to *want* any quantity whatever. They do not even engage to continue their business. If they see fit to discontinue it on the very day on which the supposed agreement is entered into, they are at entire liberty to do so at their own option, and whatever might have been defendant's expectation, he is without remedy. * * *
>
> To be a sufficient consideration it is necessary that plaintiff's promise be a benefit to defendant, or an injury to plaintiffs. (1 *Parsons on Contracts,* 431.) But so long as, for the reasons before given, plaintiffs are not bound to do anything whatever by virtue of their promise, the *promise* can not be such benefit or injury.

The facts in *Dennis* v. *Slyfield,* 117 Fed. 474, make the case very much in point. The wording of the relevant part of the contract in that case was stated by the Circuit Court of Appeals for the Sixth Circuit to have been as follows:

> Whereas, said parties of the second part are desirous to ship by vessel certain lots of hardwood lumber, party of the first part agrees to

> carry on the above-named boats any or all of this lumber, as may be desired by the parties of the second part from time to time during the season of navigation of 1899, at the following prices, etc.

The Court then held that the supposed contract was invalid, saying, per Lurton, J., at page 477:

> The respondent thereby agreed to carry at a price named all the lumber which the libelants might from time to time during the season deliver to him for carriage, but it does not oblige the opposite party to do more—even by implication—than to pay him the prices named for the carriage of all lumber delivered for carriage during the season. The writing is therefore void for want of mútuality.

At page 478 the following apt remarks appear:

> It is doubtless true that libelants expected to ship their entire season's lumber by respondent's vessels, and that they expected to have for shipment during the season about 15,000-000 of feet. The respondent doubtless shared in these expectations, and expected to carry for the libelant the amount of lumber named. But it is well said in *Knox* v. *Lee,* 12 Wall. 457, 20 L. Ed. 287, and quoted with approval in *Maryland* v. *Railroad Co.,* 22 Wall. 105, 22 L. Ed. 713, that:
>
> "There is a well recognized distinction between the expectation of the parties to a contract, and the duty imposed by it. Were it not so, the expectation of results would

> always be equivalent to a binding engagement that they should follow."
>
> The plain construction of the writing which the parties mutually signed left it wholly optional with the libelant whether they would ship "any or all" of the certain lots of lumber referred to by the vessels of the respondent.

*A. Santaella & Co.* v. *Otto F. Lange Co.* (C. C. A. 8th Cir.) 155 Fed. 721, discusses a contract where one of the parties, a cigar dealer, by promising to take as many of a particular brand as he desired for his wants, was held to have entered into no binding obligation. The following apposite language in the opinion per Philips, J., appears on pages 721-2:

> The controlling question for determination is: Did the defendants have an enforceable contract with the plaintiff? It must be conceded that, if the defendants had such a contract, it was essential to its validity that it should have been mutually obligatory upon both parties. If the defendants could compel the plaintiff to ship cigars, the plaintiff ought to be in a position to compel the defendants to take. Were the defendants under any obligation to send in orders within any particular time, or for any specified quantity or quality of cigars? The allegations of the counterclaim and the version given of the agreement in the testimony of Otto F. Lange answer these questions. It was entirely at the option of the defendants, dependent upon the conditions of their business and trade, as to whether they would send in any

> orders at all. From any cause, such as depression in business, or other more desirable arrangements, or a desire to get out of that line of trade, the defendants were at liberty to cease at any time to send orders to the plaintiff, without liability for breach of contract. As shown by the entire dealing between the parties, both unquestionably understood that the plaintiff could only ship cigars as and when ordered by the defendants.

See also *American Cotton Oil Co.* v. *Kirk*, 68 Fed. 791; *Greene* v. *Sigua Iron Co.*, 88 Fed. 203; *Crane* v. *Crane & Co.*, 105 Fed. 869, 872; *Gross* v. *Stampler*, 165 N. Y. S. 214; *Rafolovitz* v. *American Tobacco Co,*. 73 Hun. 87; *Commercial Wood & Cement Co.*, v. *Northampton*, 115 App. Div. 388; *Chicago, etc., Ry. Co.* v. *Dane*, 43 N. Y. 240, 243; *Smith* v. *Jones, et al.*, 21 Utah 270, 60 Pac. 1104; *Hoffman* v. *Maffiolo*, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427; *Higbie* v. *Rust*, 211 Ill. 333, 71 N. E. 1010; *McCaw Mfg. Co.* v. *Feldes*, 115 Ga. 408, 41 S. E. 664; *American Agricultural Chemical Co.* v. *Kennedy*, 103 Va. 171, 48 S. E. 868; and the many other authorities cited in the opinions above discussed.

Summing up this point, we submit that the decision of the learned Circuit Court of Appeals holding that this alleged contract is mutual and binding is erroneous, for the following reasons:

(1) It disregards the vital words "shipped from," thus resulting in a misconstruction of the Mammoth Company's promise.

(2) It apparently depends upon cases in which material facts were present which are conspicuously absent from the case at bar, such as;

(a) unequivocal promises to sell *total* output or to buy *all* requirements,

(b) prior and extensive dealings between the parties, and

(c) the existence of a known and measurable established business.

(3) It depends partly upon a holding that the "promised option" was alone sufficient consideration for the buyer's promise, when the wording of the "contract" makes it clear that it was not so intended.

(4) It disregards a consistent line of authorities declaring *invalid* agreements which much more nearly resemble the one at bar than do the contracts in the cases upon which the opinion relies.

## III.

**Plaintiff's assignor did not duly perform upon its part, but broke the contract by refusing to make its shipments approximately equal from week to week.**

An *essential premise* of plaintiff's recovery is, of course, his pleading and proving that his assignor duly performed its obligations under the contract which the defendants Beer, Sondheimer & Co. are alleged to have broken. (Record, p. 46.) By their answer the defendants before the court denied the plaintiff's averments of due performance (p. 54) and

affirmatively alleged (p. 55) that the "Mammoth Copper Mining Company had failed to carry out and perform the terms and conditions of the contract sued upon, whereby the said Beer, Sondheimer & Co. became and were released from any other performance upon their part."

The agreement in question contained a clause reading as follows:

> "Shipments to be made in as near as possible equal weekly quantities" (p. 50).

If the seller had any obligation whatsoever under this so-called "contract," that clause was the most important one of all. It constituted the sole check upon the seller's caprice—the sole *partial* protection to the buyers against being always called upon to perform at the greatest market disadvantage to themselves.

Concerning this point of due performance, the Circuit Court of Appeals merely stated that it found "on this record that the Mammoth Company carried out its promises under the terms of the contract. It completed the picking plant by March 5, 1917. This was done with reasonable dispatch." (Record, p. 665.)

This missed the point entirely in regard to the picking plant. It was never claimed that the Mammoth Company had broken the contract by failing to erect it more promptly. On the contrary, the point was urged that the Mammoth Company was never under any contract obligation to erect the picking plant, as indeed it was not.

The point raised by the appellants was that the Mammoth Company had broken its contract, if one there was, by failing to ship in equal weekly quantities. To that question the learned appellate court does not appear to have given consideration, except by references in the statement of facts in the opening paragraphs of its opinion, to some informal findings of the District Court upon that feature of the case (Rec., p. 661).

The District Court did purport to pass upon the question of due performance. That issue is a most important matter if it can be held that this alleged "contract" is not an invalid "will, wish or want" agreement. Judge Hand decided that the contract was not a *nudum pactum*, because the obligation of mining and *shipping* ore *in good faith* would be *implied*. Notwithstanding this, when it came to the issue of due performance or first breach, the learned trial court apparently gave little consideration to the manner in which the mining company performed this implied obligation of dealing in *good faith*. The court apparently also overlooked the mining company's repudiation of the only express agreement relating to this subject—that is, the promise to ship "in as near as possible equal weekly quantities." Since the Circuit Court of Appeals affirmed practically without opinion upon this point it becomes important to examine the "findings" of the trial court in the light of the proven facts.

Now, it appears at every stage of the case that the Mammoth Company did not, and would not, perform its part of the contract with respect to approximate equality of weekly shipments. From the making of the alleged contract down to about the 1st of January, 1915, the quantity of ore shipped was far below the average said to have been expected by the parties. Indeed, the telegrams passing between Mr. Salinger and Mr. Metcalf show that the Mammoth Company would not even attempt to ship any appreciable quantity unless the market prices turned in favor of the Mammoth Company. But when spelter prices did rise so as to favor the Mammoth Company (p. 623), the shipments of ore began to increase far beyond any such contemplated monthly average of 400 to 500 tons (p. 463–468). The March shipments, which caused Beer, Sondheimer & Co.'s protest, were at about three times that rate; and in June, 1915, the Mammoth Company tendered nearly 4,000 tons. (Record, p. 467, Exh. 59.)

Here is a table showing the facts as to the shipments made and tendered:

AMOUNTS SHIPPED.

| 1914. Week of— | | Price of spelter. |
|---|---|---|
| Aug. 26–Sept. 10 | None (Aug. 26 was date of agreement) | $0.058 |
| Sept. 10-16 | 95 tons | .052 |
| Sept. 16–23 | None | .05 |
| Sept. 23–30 | 49 tons (Sept. 29 the agreement was executed). | .048 |
| Oct. 1–7 | None | .0475 |
| Oct. 7–14 | do | .045 |
| Oct. 14–21 | do | .046 |
| Oct. 21–28 | do | .049 |
| Oct. 28–Nov. 4 | do | .048 |
| Nov. 4–11 | do | .048 |
| Nov. 11–18 | do | .049 |
| Nov. 18–25 | do | .05 |
| Nov. 25–Dec. 2 | 236 tons (Exh. 31, p. 463) | .051 |
| Dec. 2–9 | None (Exh. 31, p. 463) | .054 |
| Dec. 9–16 | 43 tons (Exh. 31, p. 463) | .055 |
| Dec. 16–23 | None (Exh. 31, p. 463) | .054 |
| Dec. 23–30 | 39 tons (Exh. 31, p. 463) | .054 |
| 1915. | | |
| Jan. 1–7 | 46 tons (Exh. 31, p. 463) | .055 |
| Jan. 7–14 | None (Exh. 31, p. 463) | .058 |
| Jan. 14–21 | 56 tons (Exh. 31, p. 463) | .06 |
| Jan. 21–28 | 45 tons (Exh. 31, p. 463) | .067 |
| Jan. 28–Feb. 4 | 54 tons (Exh. 31, p. 463) | .073 |
| Feb. 4–11 | 50 tons (Exh. 31, p. 463) | .078 |
| Feb. 11–18 | 216 tons (Exh. 31, p. 463) | .082 |
| Feb. 18–25 | 163 tons (Exh. 31, p. 463) | .086 |
| Feb. 25–Mch. 4 | 110 tons (Exh. 31, p. 463) (March 5 or Feb. 26, plant completed.) | .094 |
| Mch. 4–11 | 385 tons | .08 |
| Mch. 17 | Beer, Sondheimer & Co. object to large shipments (Exh. 53, p. 465). | .078 |
| Mch. 23 | 800 tons arrive at Bartlesville, and Beer, Sondheimer & Co. protest (Exh. 54, p. 466). | .084 |
| Mch. 24 | 2 carloads (100 tons) arrive at Bartlesville and Beer, Sondheimer & Co. protest (Exh. 55, p. 466). | .084 |
| May 15 | 2,394 tons offered (Exh. 58, p. 467) | .134 |
| June 16 | 3,915 tons offered (Exh. 59, p. 467) | .213 |
| July 12 | 3,811 tons offered (Exh. 60, p. 468) | .209 |

During the week of September 10 to 16, 1914, when spelter was quoted at 5.2 cents per pound, about 95 tons were shipped; but during the week of September 23 to 30, when spelter went below 4.8 cents per pound, only about 49 tons were shipped. Beginning with October 1 spelter declined and did not again reach 5 cents until the week ending November 25, 1914; and during this entire seven weeks' period not one pound of ore was shipped by the Mammoth Company. Immediately after spelter again reached the basic 5 cents price, during the week from November 26 to December 2, 236 tons of ore were shipped. Evidently that quantity had been produced and stored during the period when spelter was low, to be shipped only when the quotation for spelter rose above 5 cents. The tabulation of ore shipments contained in plaintiff's Exhibit 31 (p. 463) shows that in the last-mentioned week 3 carloads, aggregating about 150 tons, were shipped out on one day (November 28) and 2 carloads were shipped on November 30. Can there be any doubt that these shipments were an accumulation, withheld until it suited the Mammoth Company's purposes to ship it?

In December, 1914, there were two shipments at fortnightly intervals, about 40 tons each; but beginning with the second week in January, 1915, when spelter prices had risen to about 6 cents per pound, some 50 tons were shipped each week. This continued until the middle of February, when the price of spelter had reached 8 cents per pound.

The price being so favorable, the seller began to forward much larger quantities. The first week when spelter was above 8 cents, the mining company shipped 216 tons—a larger quantity than the average monthly shipments theretofore. And from that time on, as the price of spelter steadily increased, the quantities shipped were also increased in a way and to a degree utterly inconsistent with any attempt to make them "as near as possible equal weekly quantities."

In the face of plaintiff's Exhibit 31 (p. 463) and Metcalf's telegrams (pp. 613–614) we do not think even the plaintiff-appellee can make much of the trial court's statement (p. 61) that "there is no evidence that the Mammoth Company did not ship as nearly equal quantities 'as possible.'" It is true that the picking plant was not completed until March, 1915, but neither before nor after its completion was there any pretense of trying to approximate the 400–500 tons per month, which the uncontradicted testimony of Salinger, stressed by the trial court, showed that Eardley, who negotiated the contract for the mining company, had mentioned "as the amount of zinc which the mining company might be expected to produce." (Record, p. 57.)

There can be no dispute about the fact that the shipments were not nearly equal over any period; and there was no concealment of the seller's intention not to try to make them so. This condition of the agreement was not only unperformed, but openly flouted by the seller. Salinger's October and No-

vember telegrams, calling for expected shipments, were answered by the seller's manager with the bald statements that "zinc ore tonnage depends altogether on market price of spelter"; that, with low prices, shipments would be "very light"; and that, with spelter above five, the mining company would "probably ship about 200 tons per month" (defendants' Exhibits J, L, and N, pp. 613–614). When the abnormally high spelter price tempted the mining company to ship 800 tons in about half a month (over seven times the rate mentioned in Exhibits L and N—see page 57) and Beer, Sondheimer & Company's telegram of March 17th protested against such unfair methods, the mining company seems to have given no explanation and no offer of any approximately equal rate of shipment. On the contrary, the seller's response was an insistence upon its intention of shipping all the ore on hand, irrespective of any weekly rate; and the quarrel reached its climax in a tender of thousands of tons at once.

In other words, the plaintiff's assignor not only broke, but wholly repudiated both the express clause regulating its performance and the implied agreement, which the court below assumed as a basis for awarding recovery. Having (on the district court's premise) promised not to "consult his own interest in developing the material contracted for," at least in so far as concerned the rate of weekly shipments which he might choose to send, the seller's manager openly declares that the seller's own interest alone will govern the rate and he acts accordingly. Instead of "as

near equal as possible," he makes the weekly shipments as unequal as the spelter market fluctuations. And, when Beer, Sondheimer & Co. demand that the shipments be held down to "tonnage reasonably equal to the average monthly amount shipped heretofore," he piles Ossa on Pelion, tenders thousand of tons; claims breach of contract by the buyers in refusing to accept the abnormal quantities; and assigns to this plaintiff the right to sue, under allegations that the seller has "in all respects (!) complied with" the contract.

Even in cases wherein there is no explicit provision on the point, the courts hold that good faith is required in the performance of output or requirement contracts, and that such good faith forbids either party to utilize the indefinite clauses of the contract for speculative purposes.

In *New York Central Iron Works* v. *U. S. Radiator Company*, 174 N. Y. 331, the Court said at page 335:

> The obligation of good faith and fair dealing towards each other is implied in every contract of this character. The plaintiff could not use the contract for the purpose of speculation in a rising market since that would be a plain abuse of the rights conferred and something like a fraud upon the seller. The plaintiff's claim for damages in this case might have been affected by the condition and customs of the trade, and any breach of good faith on its part could be taken into account. In such a case it would be competent for the defendant

> to plead and prove facts to show that the orders were in excess of the plaintiff's reasonable needs and were not justified by the conditions of the business or the customs of the trade. In other words, that the plaintiff was not acting reasonably or in good faith, but using the contract for a purpose not within the contemplation of the parties; that is to say, for speculative as distinguished from regular and ordinary business purposes. But no defense of this kind was either pleaded or proved in this case, and so the judgment must be affirmed, with costs.

In *Moore* v. *American Molasses Company*, 179 App. Div. 505, the Court, after quoting the case just mentioned, said at page 508:

> In the case at bar such defense has been pleaded and if proven may defeat in whole or in part the alleged cause of action.

In *Wheeler Company* v. *Mendleson*, 180 App. Div. 9, the action was brought to recover damages for breach of a contract by which defendants agreed to sell and plaintiff agreed to buy "their supply" of caustic soda and lye for the year 1915. It appeared that there had been dealings between the parties for twenty years; that 2,000 pounds of the soda bought by plaintiff in August, 1914, was sufficient for a period of over fifteen months; that from January 1, to November 30, 1915, plaintiff had given no orders under the contract; but when the price of the soda having more than doubled, plaintiff then demanded

delivery of 50,000 pounds. In reversing a judgment in plaintiff's favor, the court said (at pages 11–12):

> Unquestionably the contract should be given a reasonable construction. This would allow the plaintiff to call for shipments of sufficient of the products to fill its orders and to keep in stock a reasonable supply for its trade. However, as to an executory contract which is indefinite as to the quantity of goods to be furnished, the obligation of good faith and fair dealing towards each other is implied, and a party to a contract has no right to use it for a purpose not within the contemplation of the parties, as for speculative as distinguished from regular and ordinary business purposes.

This matter of equal shipments is not a mere side issue. As shown by the opinion of the District Court, if there was any valid contract, such clause went to the essence of it. And Beer, Sondheimer & Company's telegram of March 17th, which the trial court apparently regarded as the first breach of contract, was not a flat refusal to accept any further deliveries, but merely an insistence upon keeping the shipments down to a reasonably equal average, viz: reasonably equal to the 200 tons a month which Metcalf's telegrams forecasted and which had been the average when spelter prices were between 5 and 6 cents.

The District Court seems to have read too hastily that telegram of March 17 (plaintiff's Exhibit 53, pp.

57, 465). As the principal reason for overruling the defense of prior breach, the opinion says (p. 61):

> No objection was made to the deliveries on this ground, so that the breach was waived as to all ore accepted. As for the ore tendered in March, acceptance of which was refused the objection to taking it was based solely on the vis major clause.

This overlooks the whole first part of the telegram of March 17. The last part of this Exhibit 53 refers to "page five of our contract," which contained the vis major clause; but all the rest of the telegram (p. 465) was directed to the question of equality in average rate of shipments. The communication begins with a protest at the great and sudden increase in the rate of shipment, and it expressly offers to accept shipment on a reasonably equal monthly average. The "abnormal conditions" and the vis major clause of "page five" were referred to, not as excuses for a total refusal, but only as extra justification for insisting on the buyer's right to object to arbitrary increases of shipments in abnormal market conditions. The gist of the telegram is in the phrase "tonnages reasonably equal to the average," which relates directly to the contract clause requiring the shipments to be "as nearly as possible equal."

The first part of the telegram (plaintiff's Exhibit 53) was as follows:

> Are advised you shipped from March sixth to ninth fifty tons zinc ore daily, whilst your average shipments since beginning contract

> amounts to only about two hundred tons monthly. In view of abnormal conditions we will only accept tonnages reasonably equal to the average monthly amount shipped heretofore (pp. 57, 465).

The sentence containing the refusal to receive "further tonnages" and referring to page 5 of the contract ought to be read in the light of what precedes it.

Likewise the buyer's telegram of March 23 was not a refusal to accept any ore, but only a refusal to accept "such tonnages" as the seller willfully insisted upon shipping, viz, 800 tons in a little over half a month.

Finally, Beer, Sondheimer & Co.'s letter of April 6, 1915 (defendant's Exhibit O), while "waiving no legal rights" as to absolute refusal, expressly said:

> We are willing to arrange to take delivery from you of zinc crude ore not to exceed a maximum of 400 tons a month.

And the whole gist of that letter was a protest against the seller's increasing the shipments "merely because the price of spelter has risen" (p. 615). The Mammoth Company's answer (defendant's Exhibit P) amounts to an express refusal to try to make the rate of shipments equal (p. 616).

Thus the correspondence relating to the supposed breach of contract on the part of the defendant partnership brings out in sharp relief the Mining Company's prior breach and repudiation of the one clause restricting its conduct under the agreement. It

shows that the selling company throughout either could not or would not promise anything measurable about the rate or quantum of performance on its part. Prior to March it probably could not, because it had no known production. In March and April it would not, because it preferred to hold the buyers to an agreement under which the seller's volition was unfettered. Then, for the first time Beer, Sondheimer & Company realized that the agreement which they thought was a "contract" contained no promises from the seller except illusory ones. They offered a fair, definite arrangement, and it was rejected. Their subsequent refusal to recognize the one-sided "contract" was, therefore, morally and legally justified.

## IV.

**It is against public policy to enforce the contract sued upon.**

The management of plaintiff's assignor had, previously to the alleged contract, made a contract with another buyer for the exclusive sale of all the ore in question. Therefore, the agreement set forth in the complaint below was made in violation of the previous contract and was against public policy.

Plaintiff's assignor, the Mammoth Copper Mining Co. of Kennett, Calif., and a corporation named the United States Smelting Co., were both subsidiaries of the United States Smelting, Refining & Mining Co., which owned all of their capital stocks. (Record p. 134.) The officers and directors of the parent

company were also officers and directors of both these subsidiary companies, which were consequently under the same ownership and control. (Record, pp. 134–135.) The relationship was so close that the subsidiaries were practically mere branches of the United States Smelting, Refining & Mining Co. and were naturally spoken of as "the branch offices" (pp. 336, 337, 629, et seq).

The relationship between managers and superintendents, etc., of the two subsidiaries was also very close. We have in other places referred to the United States Smelting Co. (the other subsidiary) as the Mammoth Company's *alter ego.* We submit that the following facts, gathered from the somewhat confusing testimony of the various officers of the affiliated companies, justify its being so designated:

(1) As stated above, they both had the same officers and directors.

(2) They had joint letter-heads. (Record, p. 610, Exh. D.)

(3) Mr. Heintz was general manager of the United States Smelting Co., and traffic manager of *both* subsidiaries. (Record, p. 160). He also had a "good deal to do with the *sale* of ores for the Mammoth Company." (Rec. pp. 135, 141.)

(4) The United States Smelting Co. sometimes contracted for the sale of ores from the Mammoth Company's mine. (Rec. p. 136.)

(5) The Mammoth Company had no selling organization for zinc ores. (Rec. p. 141.)

(6) Eardley, who was primarily in the employ of the United States Smelting Co., had an office in Salt Lake City, from which he negotiated contracts for both companies, and made offers of the zinc ores from the Mammoth mine, in the name of the U. S. Smelting Co. (Rec. pp. 163, 165, 493, 610-611.)

It was on June 10th, 1914 (prior to the making of the agreement sued upon) that the United States Smelting Co. (the other subsidiary) entered into a contract with the American Metal Co., to which reference has been made in the opening paragraph of our argument upon this point. This contract was negotiated by Eardley, who also conducted the negotiations leading up to the "contract" with Beer, Sondheimer & Co. (Rec. p. 165.)

It cannot be disputed but that the express terms of this prior contract between the United States Smelting Co. and the American Metal Co. covered all the 35% zinc ore from Kennett, Calif., and that the Mammoth Company's mine was the only one at that place, or elsewhere in Shasta County, that contained zinc ore. (Rec. pp. 166-167, 168-169.) The American Metal Co. contract called for all the 35% zinc ore up to 800 tons per month, and contained an *option* covering any excess production of 35% zinc ore. (Rec. pp. 617-618.)

Mr. Heintz, who, as has been said, was the general manager of the United States Smelting Co. and the traffic manager of the parent company and of both the Mammoth Co. and the United States Smelting Co. as well as all the other subsidiaries (p. 160),

testified that the United States Smelting Co. could have bought the ore from the Mammoth Co. at the mouth of the mine (p. 166). As both subsidiaries were owned by the parent company and controlled through interlocking directorates and had the same officers, the mining company's agents negotiating the subsequent contract with Beer, Sondheimer & Co. for the product of the mines in Shasta County must have been aware of the existence of the contract by which the product contemplated to be sold to Beer, Sondheimer & Co. had already been sold to the American Metal Co. Indeed, Mr. Heintz, who executed the American Metal contract, signed as witness the alleged contract in suit (p. 165). Furthermore, Metcalf (the Mammoth Company) was forced to admit that he knew about the "arrangement" between the United States Smelting Co. and the American Metal Co. at the time it was entered into. (Rec. pp. 140-141.)

This being the case made out by the evidence, we submit that the Court should not have granted relief under a contract which the plaintiff's assignor knew that it was disqualified morally, if not legally, from making. It was inherently impossible to carry out both contracts; and consequently the making of the second one was a violation of a duty toward the American Metal Co. If Beer, Sondheimer & Co. had known of these facts, both parties to the agreement here involved would be *in pari delictu.* If, as the evidence indicates, Beer, Sondheimer & Co. did not know of the earlier contract, then the making of the

later one was in the nature of a fraud upon Beer, Sondheimer & Co.

If, as we understand, the Shasta County mine producing the ore in question was unique in that the ore contained certain proportions of various metals not readily procurable from any other source, the American Metal Co. presumably had a right to enforce specific performance of its purchase contract. It was thus possible, if not probable, that Beer, Sondheimer & Co. might have found themselves cut off from the "average contemplated" supply of Shasta County zinc ore and been compelled to obtain inferior ore elsewhere at a great loss. At any rate, the supposed consideration of "abstention from dealing" with any other metal purchaser was broken in advance.

The learned judges of the Circuit Court of Appeals in that part of the opinion touching upon this point, seem to have been somewhat confused as to what were the facts which were relied upon to support our argument. To this circumstance may be due their holding that the corporate entities of the parent company and its two closely affiliated subsidiaries (the Mammoth Company and its *alter ego*, the United States Smelting Co.) should not be disregarded. The learned Appellate Court seems to have assumed that the contract with the American Smelting Co. was with the parent company; and that our contention related only to "*negotiations* with the U. S. Smelting Co." (the subsidiary) "made on behalf of the Mammoth Company for the sale of the ore in suit with the American Metal Company on two distinct occasions

after the contract of June 10, 1914 * * *. Once was *before* the ore was sold to Beer, Sondheimer & Company and the other time was *after* Beer, Sondheimer & Company had broken its contract * * *." The court then said that it could "see nothing in these transactions which establishes the claim of *mala fides*." (Rec. p. 665.)

As to what was done *after* the alleged breach of contract, we have no interest as far as the present point is concerned. As to what *negotiations* the United States Smelting Company entered into with others *before* Beer, Sondheimer & Co. are alleged to have broken their contract, we also are not so much concerned. The point is that the ore, which our learned opponents claim is covered by the contract sued upon, was already *contracted* to be sold to some one else *before* it was "contracted" to be sold to Beer, Sondheimer & Co.

In order to explain away the significance of the American Metal Co. contract, evidence was introduced by *counsel for plaintiff* to show that the U. S. Smelting Co. was delegated by the Mammoth Company to try to sell its zinc ore *after* the American Metal Co. contract had been made; and that pursuant thereto a further offer was made to the American Metal Co. itself after June 10, 1914. (Rec. p. 494, Exh. 76–a.) This fact, our learned opponents argued, showed that the Mammoth Company zinc ore could not have been meant to be included in the contract of June 10th.

We submit that the contract of June 10th, 1914, is the best evidence of what ore it covered, and that to admit any evidence in an endeavor to explain away its plain language was error. (See present appellants' 37th, 41st, and 42nd Assignments of Error. Rec. pp. 679, 680, 681.) Moreover, if it was proper to consider such evidence, and taking the same for what it is worth, Eardley's letter of July 28th, 1914, to the American Metal Co. and the letters to which it replies (Exh. "T," p. 622; Exh. 70, p. 491 and Exh. 71, p. 492) indicate that the subject of the negotiations was copper or a copper-zinc product containing so much copper that the question was whether it should be "smelted in a copper furnace" or "shipped as zinc concentrates" (Exh. 70). It was probably on this ground, i. e., the *nature* of the subject matter, and not on the ground of its *source*, that the United States Smelting Co. said to the American Metal Co. in its letter of July 23, 1924 (Exh. 70), that "the ore referred to in our letter of the 15th inst. (Exh. T., p. 622) is not controlled by the United States Smelting Company's contract with you."

In opposition to all of Eardley's evidence upon this point there is the telegram of Putzel, of the American Metal Company, *which was sent at the time the negotiations were in progress.* His telegram shows that he, at least, was *negotiating* with Eardley for the sale of Midvale and *Kennett* (Mammoth Company) crude ore. (Rec. p. 652, Exh. A-1.) Considering the fact that the American Metal Co. *contract* does

*in terms* cover all the Midvale and Kennett "zinc sulphide crude ore," whose view as to what that contract was intended to cover is more entitled to credence?

The Circuit Court of Appeals concluded its opinion on the point now under consideration by stating that:

> the U. S. Smelting Company, being a separate and distinct entity, could not and did not make contracts for the Mammoth Company. (Rec. p. 665.)

This seems to have been based upon some testimony to the effect that the United States Smelting Co. (Eardley) was not accustomed to making contracts on behalf of the Mammoth Company, without authority from Metcalf; referring to pages 141, 155, 188–189, 169, and 191 of the Record. Of course, such testimony does *not* of itself show that Metcalf did not either authorize or ratify the contract made on June 10th, 1914, with the American Metal Co. The evidence, we submit, rather raises an inference that Metcalf had approved of Eardley's negotiating the contract of June 10, 1914, in so far as it included Mammoth ores. At least, it tends to lead to that conclusion, in the absence of clear and convincing evidence that Metcalf did not authorize or ratify that particular contract. As to what Metcalf had to say about the matter, see pages 140–141 of the Record, especially his answers to questions Nos. 48, 49, and 60.

The learned District Court recognized that the American Metal Co. contract "literally embraced the ore in question" by a clause which "strictly covered

any interest the parent company had in the Mammoth ore body" (p. 62). But the court, believing that there was no mala fides, rejected this defense because of the "separate corporate identity" and the "many theoretical and practical objections to treating the American Metal Company's contract as enforcible against Beer, Sondheimer & Co." (p. 62).

This, we submit, "is sticking in the bark". In substance, the United States Smelting, Refining & Mining Company, the parent company, through the two closely related branches, made two contracts for the exclusive sale of the same ore; so that one or the other of the two purchasers was sure to be cheated, in the sense of failing to obtain the ores bargained for. To insist on the separate corporate identity of the subsidiaries amounts to abetting the parent company in taking the fruits of a wrong, on the theory that it did not let its right hand know what its left hand had been doing.

The District Court directed its attention so much to the question of specific performance of the American Metal Co. contract that it seems to have overlooked the question of public policy involved in upholding the Beer, Sondheimer contract. On this question the authorities are emphatic. In 13 *Corpus Juris*, 413, the proposition is expressed as follows:

> An agreement is *illegal and void* where its object is the commission of a civil wrong against a third person, although the wrong may not be an indictable offense or crime either at common law or under the statutes.

*Hocking Valley Railroad Co.* v. *Barbour,* 190 App. Div. 341, is a good example of a case illustrative of this principle. There the plaintiff assumed to sell to the Central Locomotive & Car Works its entire quantity of gondola cars, although plaintiff had previously contracted to sell a large number of these cars to one Wardwell. The Central Locomotive Works, knowing of the previous contract, gave a bond executed by the defendant to save the plaintiff harmless from all damages and costs which it might suffer through entering into the second contract. The cars were delivered to the Central Locomotive & Car Works. Wardwell sued upon his contract and obtained judgment thereon, and the plaintiff then sued Barbour as bondsman upon the contract of indemnity. The Appellate Division, First Department, held that the indemnity bond was put up for an illegal purpose, and therefore unenforceable. In its opinion the court says (190 App. Div. at p. 344):

> If the court should enforce this contract it would be thereby making itself a party to the consummation of the wrong. It matters not in what position the parties may find themselves where they are in *pari delicto.* A court will aid neither party to enforce any right to claim under such an agreement. Whatever right of action Wardwell might have had against the plaintiff, he had a primary right to have the contract consummated, and as this indemnity bond was given with full knowledge of all the parties of the fact that its purpose

> was to procure the plaintiff to deliberately violate his contract with Wardwell, the court will not give its aid. The law cares nothing for what a fraudulent party may lose, but will leave the parties where it finds them and will leave them to disentangle themselves from the meshes in which they have become involved by their fraudulent agreement.
>
> That such an agreement is illegal and against public policy is enunciated in the case of *Moody* v. *Newmark & Edwards*, 121 Calif. 446.

See also *Roberts* v. *Criss*, an action at law (C. C. A. 2nd Cir.), 266 Fed. 296, where the head-note summarizes the holding as follows:

> A contract, the basis of which is the violation by one of the parties of a contract with a third party, will not be enforced by a court as between the parties.

The learned court had no hesitancy in pronouncing such an agreement illegal and said at page 301:

> The courts do not aid the parties to illegal agreements. If any principle of law is settled it is that *a party to an illegal undertaking cannot come into a court either of law or equity* and ask to have his illegal contract carried out. Ex dolo malo non oritur actio, and in pari delicto potior est conditio defendentis. It makes no difference whether the contract has been executed, or remains still executory. The defense of illegality may be set up, not as a protection to defendant, but as a disability in the plaintiff.

From the authorities it would seem that if Beer, Sondheimer & Co. after executing the present agreement without knowledge of the prior rights of the American Metal Co. had discovered the real facts and induced the plaintiff's assignor to deliver ore to themselves without first obtaining a release from the American Metal Co., they might have become accountable as trustees *de son tort* for profits realized upon the resale or use of the product.

On the other hand, with Beer, Sondheimer & Co. kept in ignorance and acting throughout in good faith, their position is stronger than that of the defendants whose plea of *contra bones mores* prevailed in the *Hocking Valley* and *Roberts* cases. Either way, principles of public policy forbid enforcement of the second contract, and the plaintiff should have been denied any recovery because of the wrong committed by his assignor and the Smelting, Refining & Mining Company, through plaintiff's assignor and its affiliated company.

Moreover, the fact that the illegality of this "contract" was not pleaded is immaterial. Where it appears during the trial that the contract is against good morals, it is proper and even necessary for the court of its own motion to refuse to grant the plaintiff relief. *Oscanyan* v. *Arms Co.,* 103 U. S. 261.

This objection to the "contract" in the case at bar was raised by our 14th Assignment of Error. But it was not even necessary to have done this, for the objection of illegality may be raised even for the first time upon an appeal. *Crichfield* v. *Bermudez Asphalt Paving Co.* (Ill.), 51 N. E. 552.

## V.

**No more than nominal damages should have been awarded, since the evidence showed no actual resale loss.**

It is a curious feature of the case that, although the damages assessed against the absent defendants' property exceed a quarter of a million dollars, *the selling interests did not suffer any actual loss* from the buyers' refusal of the ore tendered under the one-sided contract. The damages were measured upon the theory that a so-called "resale" of the ore by the Mammoth Copper Mining Company to the United States Smelting Company, at a price much below the contract price, was a fair resale and that the difference in price represented a loss to the plaintiff's assignor.

But the important fact is that the United States Smelting, Refining & Mining Company, which owned all the stock of the Mammoth Copper Mining Company, the plaintiff's assignor and all the stock of the United States Smelting Company, the resale vendee, simply caused the ore to be transferred from one of its subsidiaries or branches to the other. (Rec. p. 71). Through the latter subsidiary, the parent company utilized the ore and presumably realized all of the potential value contained in its metallic contents (Rec. p. 190), which may well have exceeded the prices agreed to be paid by Beer, Sondheimer & Co.

That the Mammoth Copper Mining Company and the United States Smelting Company were merely

separately incorporated branches of the U. S. Smelting, Refining & Mining Co. has already been pointed out under Point IV *supra*, and will probably not be disputed. There were even no minority shareholders in either subsidiary except the directors holding qualifying shares. (Record, p. 190.) The practical effect of sending the ore from the mining company's plant at Kennett, California, to the smelting company's plant at Altoona, Kansas, is well shown in the annual report of the parent company for 1915 (defendant's Exhibit W). President Sharp there said (p. 640):

> Owing to the extraordinary increase in the price of spelter, all the zinc smelters of the country were overloaded with ore, and the spread between the price at which zinc ore could be purchased and the spelter sold became very great. In order to take advantage of this spread and also *to have an outlet for zinc ore produced in our mines, we acquired three smelters*, located, respectively, at *Altoona*, Iola, and La Harpe, Kansas.

And in the same report Vice President Lyon, of the parent company (who was also Vice President in Charge of Operations of both the Mammoth Company and of the United States Smelting Company, Record, p. 134), reporting on the operations of the subsidiary companies, says (pp. 646–647) of the Mammoth Company's production of zinc:

> The latter was taken to a sorting plant, constructed at the beginning of the year at the smelting works of the Mammoth Copper Mining

> Company, where the ore was divided into two products: One product being zinc ore, that was shipped to the *zinc smelters of the company in Kansas*, and the other a copper ore, which was smelted on the spot.

The zinc ore here in question was, in fact, "shipped to the zinc smelters of the company in Kansas," i. e., to the Altoona smelters operated by the same parent company under the name of its other subsidiary, the United States Smelting Company.

There was no resale in the proper sense of the word. It was a "wash sale." The seller and purported purchaser were separate legal personalities, but only theoretically so. There was no dealing at arm's length between a seller anxious to get a high price and a buyer anxious to negotiate a low one. The parent company pulled the strings of both its puppets. There were not different individuals interested in the ownership before and after the sale. The parent company's stockholders continued to be the sole beneficial owners of the ore just as much after as before the resale. No cash whatever was paid or received. There was merely a bookkeeping transaction, in which the holding company charged certain prices to one of its subsidiaries and credited such prices to the other and caused them to exchange certain "voucher drafts" (pp. 71–72, 652–653).

We do not claim bad faith in this arrangement. But we do claim that its true nature must be recognized. Although outwardly it was a resale between two separate corporations, inwardly it was no such

thing. *The inescapable fact is that the United States Smelting, Refining & Mining Company, the owner of the selling corporation, elected not to resell the ore to a third party, but to utilize it in its own smelting subsidiary's business.* And the special master, whose report shows all the facts in detail (pp. 71–72), has expressly found that (p. 72)—

> The evidence shows that the United States Smelting Company *made a profit on the sale of the spelter recovered from the Mammoth ore* over and above the cost of the ore of the smelting and of the marketing of the spelter, but does not disclose with accuracy the rate or amount of this profit.

The special master declined to take into account this item of profit, on the ground that, despite the internal arrangements of the holding company and its subsidiaries, the subsidiaries must be regarded as distinct entities (Rec. pp. 81–82). But the profit realized upon the reduction of the ore to spelter went to the holding company, which was the same company beneficially owning whatever profits might have been made out of full performance of the Beer, Sondheimer contract (Rec., p. 190). The Mammoth Company, upon the alleged default of Beer, Sondheimer & Co., was in duty bound to take all steps necessary to mitigate the damages. If we recognize that the United States Smelting Company and the Mammoth Company were one and the same thing, as they in fact were (being each an *alter ego* of the United States Smelting, Refining & Mining Co.), it follows that the profit realized by the

smelting company should be taken into account against the mining company's claim for damages.

Not until the United States Smelting Company had entirely disposed of the ore, or the finished product thereof, did the selling interests do all their duty with respect to mitigating the damages to be claimed from Beer, Sondheimer & Co. The transferring of the ore between the subsidiaries was but a step in the process of disposing of the ore, for the purpose of fixing the actual damages suffered. When the ore was reduced to spelter and sold for a certain sum, that sum, less smelting cost, smelter's compensation, etc., became the proper starting point for calculating the true damages suffered, if any. The process of reducing the crude ore to a finished product, through the smelting company, should be regarded as an incidental step toward putting the *res* into marketable condition, in order to ascertain the market value, from which the damages should be calculated.

In *Beattie* v. *N. Y. & L. I. Construction Co.*, 196 N.Y. 346, plaintiff had brought an action for damages for failure to pay for stone quarried but not received by defendant. Part of the stone left on plaintiff's hands had been *recut* and sold to a third party. After deducting plaintiff's expenses in *recutting* the stone it was found that he had made a profit on it. This profit, it was held, should have been deducted from plaintiff's damages. The court said, at page 356:

> A different question arises as to the stone which was *recut* and sold for the Hartford

> bridge. It was the duty of the plaintiffs to exercise all reasonable means to reduce, or at least not unnecessarily to enhance, their damages. When they sold for use upon the Hartford bridge a portion of the stone left on their hands by the defendant, *their damages were diminished to the extent of the profit which they made on the Hartford contract.* If the defendant is not credited with this amount, the plaintiffs will be receiving *double* payment *for the same thing.* This naked statement of that feature of the case is enough to show that the learned referee was in error in not allowing the defendant's offset to the extent of the plaintiffs' *profit* on the Hartford contract.

And in *Baker Transfer Co.* v. *Merchants' Mfg. Co.*, 12. App. Div. 260, we find the court, per Van Brunt, P. J., saying, at p. 262:

> There was another error in the trial of the case. The defendant endeavored to prove that the material, which the plaintiff claimed to have provided for the purpose of fulfilling this contract, had been used in its business and was not lying idle, *and consequently that the defendant should have had the benefit of the earnings of that part of the plaintiff's plant* which it had provided for the performance of its contract with the defendant and which it had used in its own business. This evidence was excluded, and, we think, erroneously. It was the duty of the plaintiff, if possible, to mitigate the damage arising from the breach of the defendant in the fulfillment of the contract. *If it used the material provided in its own busi-*

> *ness, it was clearly the right of the defendant to have credit therefor.*

Compare *17 C. J. 767–771, 926–927; 2 Sedgwick on Damages* (9th Ed.), sec. 608, p. 1180; *Erie County Natural Gas & F. Co.* v. *Carroll*, 11 Appeal Cases 105; and *Hinckley* v. *Bessemer Steel Co.*, 121 U. S. 264.

*We do not claim for the buyers such part of the profit as represents compensation for the work of smelting;* but *we submit that no finding of loss to the seller can be sustained without ascertaining how much profit was ultimately realized* by the interrelated selling corporations. In the absence of proof as to the amount of such profit and in the absence of proof as to market value, the legal question was: How much value inured to the selling corporations as a result of the buyers' refusal of the ore and the seller's election not to sell it to third parties? Presumably the whole potential value of the ore went to the United States Smelting, Refining & Mining Company, the owner of plaintiff's assignor. And presumably that potential value, so reduced to actual realization by the selling interests, approximated or exceeded the amounts receivable from Beer, Sondheimer & Company; *because the potential value lay in the metallic contents of the ore, and the prices of zinc* and other metals contained therein *were very high at the time of the alleged breach of contract.*

Defendants' counsel have had prepared by accountants a tabulation based upon the plaintiff's own records, showing by months the price purported to

have been paid by one subsidiary to the other for the Mammoth ore, the price realized for the finished spelter, and the cost of smelting, selling, etc. This tabulation shows that upon a total of 9,474.714 tons of ore here in question there was a smelting profit (after deducting treatment cost and selling cost) of $35.16 per ton, or a total profit of $333,065.72. The tabulation is attached to this brief as Exhibit A with an explanatory note showing the records used by plaintiff from which it has been compiled. It is believed that it is an approximately accurate statement of the profits realized by the sellers. The exact amount of the profit is not important at the present time. It is important that *the sellers realized a profit out of the ore in question of upwards of $300,000.*

*We protest, therefore, against a decree further awarding hundreds of thousands of dollars damages, without proof of any actual loss or any actual market value comparisons involved in the transaction.* We submit that a "wash sale," no matter how *bona fide*, is not a proper basis upon which to predicate an award of damages under these circumstances. The theoretically separate personality of the two subsidiaries should be disregarded. Even if plaintiff be held entitled to a judgment, the amount should be reduced to nominal damages, or else a new trial should be ordered to ascertain the actual damages.

## VI.

**The courts below erred in allowing interest.**

The special master concluded "that the plaintiff is not entitled to recover interest" (Record, p. 79) and reported his reasons very fully and very logically (pp. 85–90). The district judge wrote an opinion dated July 16, 1921, going into the question very fully (Rec. pp. 98–100), and concluded as follows: "Under the circumstances, I am inclined to adhere to the New York rule and not allow interest" (p. 100). Yet, when an order was made, nine days later, confirming the Master's Report, it was "provided * * * that interest shall be allowed upon the amount of the plaintiff's claim as found by the special master herein from the 3d day of July, 1919" (p. 97). Accordingly, the final decree made by the District Court, awards recovery of "interest from July 3, 1919, in the sum of * * * $31,800.60" (p. 102).

The Circuit Court of Appeals went even further, and decided that interest should run from June 29th, 1916, modifying the decree of the District Court accordingly. This increased the amount allowed as interest by about $46,900. June 29, 1916, was the date upon which plaintiff's assignor made an ineffectual attempt to commence an action in Utah against Beer, Sondheimer & Co. by serving a summons and complaint upon Salinger. This was held to have liquidated the claim so as to start interest running. (Rec. p. 667.) Without further discussing

this point at present, it may well be remarked that if such act "liquidated" the claim, it did so incorrectly. The Utah complaint demanded $13,000 *more* than the special master herein found to be the damages. (Compare Exh. 127, pp. 596–598, and Master's Report, p. 81.)

We will deal with the question under the following subheads:

(A) *It was erroneous to allow any interest whatsoever:*

(1) The rules of common law forbid it.

(2) The case was not a proper one for the exercise of chancery discretion in the matter.

(B) *It was erroneous to allow interest from June 29, 1916 even if it was not an abuse of chancery discretion to allow interest from the time when the state of war practically ended.*

(A) 1. *The rules of common law forbid the allowance of interest in this case.*

The plaintiff's claim is nothing more than an ordinary one for damages for nonperformance of an executory contract. It is clear that it could not be brought on the equity side of the court, unless especially authorized by Section 9 of the Trading-with-the-Enemy Act. The rule governing the recovery of interest in ordinary common law contract actions for damages is the one which should govern this case.

As to what is the common law on the question of interest we need add little to the able discussion in the Master's Report (pp. 79, 85–90) and the District

Court's opinion (pp. 98–100). As the court said, by "the New York rule" and "the settled rule in this district no interest can be allowed at law" on an unliquidated claim for damages, *not capable of being calculated by the contract breaker from data at his command or from readily ascertainable market values.*

The learned Trial Judge pointed out how applicable this rule is to the facts brought out in the case at bar by approving of and summarizing the master's report on this point (Rec., pp. 87–89), as follows (Rec., p. 99):

> Here the master has certified that there was no ascertainable market value for the product, and it is indisputable that the defendant did not have the data at its command from which the purchase price of the ore by the United States Smelting Company could be ascertained.

In support of the rule of law stated by the Trial Court and the Master see *Gray* v. *Central R. R. of New Jersey*, 157 N. Y. 483; *Sloan* v. *Baird*, 162 N. Y. 327; *Faber* v. *City of New York*, 222 N. Y. 255, 262; *Stephens* v. *Phoenix Bridge Co.*, 139 Fed. 248; *Demotte* v. *Whybrow*, 263 Fed. 366.

In *Sloan* v. *Baird, supra*, the New York Court of Appeals said (162 N. Y. at p. 329):

> It is true that much has been written upon the subject of awarding interest and that the authorities are not in entire harmony. But we must regard the question here under consider-

ation as settled by our recent decision in the case of *Gray* v. *Central R. R. Co. of N. J.* (157 N. Y. 483). In that case the rule adopted by Earle, J., in *White* v. *Miller* (78 N. Y. 393) and by Bradley, J., in *Mansfield* v. *N. Y. C. & H. R. R. R. Co.* (114 N. Y. 331) was approved and followed. The rule as stated in these cases is to the effect that in an action to recover unliquidated damages for a breach of a contract, interest is not allowable unless there is an established market value of the property, *or means accessible to the party sought to be charged* of ascertaining by computation or otherwise the amount to which the plaintiff is entitled. (See also *McMaster* v. *State*, 108 N. Y. 542.)

In *Stephens et al.* v. *Phoenix Bridge Company*, *supra*, it was said (139 Fed. at p. 250):

> The sum owing from the defendants to the plaintiff was uncertain and unascertainable by computation at the time of the commencement of the action; it depended not only upon what should be found to be the reasonable value of the material and services furnished by the plaintiff, but also upon the amount which it should be found ought to be deducted from the plaintiff's claim, and this amount was likewise uncertain and unascertainable by computation. That interest is not allowable from the commencement of the action upon such a state of facts is very satisfactorily shown by the opinion in *White* v. *Miller*, 78 N. Y. 393, 34 Am. Rep. 544. That it is not allowable at all was determined in *Delafield* v.

> *Village of Westfield*, 169 N. Y. 582, 62 N. E. 1095, which is a case exactly in point and which was cited and unquestioned in the later case of *Sweeney* v. *City of New York*, 173 N. Y. 414, 66 N. E. 101, where the general question of allowance of interest upon unliquidated demands was carefully considered by the court. (See also *Carricarti* v. *Blanco*, 121 N. Y. 230, 24 N. E. 284.) In the absence of controlling decisions in the federal courts, we are disposed to adopt as guides, in determining when interest should or should not be allowed, the rules deducible from the decisions in New York, where the question in all its phases has been so frequently and so fully discussed.

In *Demotte* v. *Whybrow*, *supra*, an opinion by Circuit Judge Rogers, cited with approval some of the foregoing cases, and impliedly held (263 Fed. at p. 368) that interest is allowable on an unliquidated demand only—

> In cases where it can be determined what amount is due, either by mere computation or by computation in connection with *established market values*, or other general recognized standards.

We submit, then, that the principle enunciated in the above-cited cases is applicable *a fortiori* to the instant case. The sum alleged to be owing from the defendants to the plaintiff was uncertain and unascertainable by computation. It was made up of a series of items representing the difference between

the net contract prices of a shipment of ore and an amount realized upon the alleged sale thereof. The calculation was so complicated and depended on so many different factors that the Mammoth Company itself has changed the amount of its claim several times (Record, pp. 95, 96). *None of the elements entering into a given item of the calculation was known to or ascertainable by the defendants.* They did not know the amount of ore that was purchased at the mine or when any given quantity was ready for shipment or what its weight might be or its metallic content. Nor could they know what sum was actually realized on the disposition of the ore by the plaintiff's assignor.

That the defendants were in no position to ascertain the amount due as damages is well shown by the evidence which plaintiff himself adduced as a basis for computing the interest claimed. The elaborate scheme of interest calculation was based in part upon the average period of time (61 days) that elapsed between the date of shipment to the United States Smelting Company and the date of the credit memorandum by which the Mammoth Company received credit for the alleged sale price on the books at Boston. (Records, pp. 85–86.) Under these circumstances, it would be absurd to suppose that Beer, Sondheimer & Co. could have ascertained with any approximate certainty the amount supposed to be owing by them to the plaintiff's assignor at any given time.

It must not be overlooked that the only defendants who were before the court were government officials, sued as such. The plaintiff is, in effect, proceeding against the Government of the United States, under a particular statute, the Trading-with-the-Enemy Act. The Alien Property Custodian and the Treasurer of the United States hold the property of Beer, Sondheimer & Company as representatives of the United States Government, in which the title to the property lies and without whose consent the claim in question can not be paid. From the time of the seizure by these Government agencies, Beer, Sondheimer & Company have had no control whatever over their property. The control and disposition of the property from the date of its seizure has been a matter which is exclusively in the hands of the Government agencies. Plaintiff's claim being, in fact, one against the Government, should be governed by the rule of law applicable to the allowance of interest in claims against the Government.

It is well settled that the Government is not liable for interest, in the absence of a special provision by Congress to that effect. *Gordon* v. *United States*, 7 Wall. 188; *United States ex rel Angarica* v. *Bayard*, 127 U. S. 251; *United States* v. *North Carolina*, 136 U. S. 211; *United States* v. *Verdier*, 164 U. S. 213; *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330. In the last-cited case, Mr. Justice Brandeis went fully into the question of allowance of interest against the Government, reaching the conclusion that it is never allowed, in the

absence of a specific provision to that effect by Congress. He states the rule as follows (p. 336):

> This denial of interest, like the refusal to tax costs against the Government in favor of the prevailing party * * * and the refusal to hold the United States liable for torts committed by its officers and agents in the ordinary course of business, * * * are hardships from which, with rare exceptions, * * * Congress has been unwilling to relieve those who either voluntarily deal with the Government or are otherwise affected by its acts.

The case of *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251, shows that the rule stated above was held to be applicable in a parallel situation. The facts in the cited case were that Angarica had a claim for property destroyed during a Cuban insurrection. A Spanish-American Claims Commission was established under an arbitration agreement to adjust claims of that nature. Angarica filed a claim before the Commission, and it decided that he had a right to recover damages to the amount of $748,108 with interest from November 1, 1875. The full amount of the award was paid to the Secretary of State of the United States. The Secretary of State paid over to Angarica the amount of the award, except $41,129.74, this being 5% of the amount received. This amount was retained by the Secretary of State until the Government of Spain should make provisions for paying the expenses of the Commission. (As a part of the agreement, Spain had assumed the

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payment of the expenses of the Commission.) The sum so retained, or so much thereof as could be utilized for the purpose, was invested in securities of the United States by the Secretary of State. Thereafter the surplus, together with interest which accrued from time to time, was similarly invested. After several years the then Secretary of State paid to the petitioner, who was the executrix of Angarica's estate, the $41,129.74, but did not pay any interest or income which had accrued during the period it had been invested. The petitioner, contending that interest or income is an incident to the principal fund and follows it, brought this proceeding to compel the Secretary of State, Bayard, to pay over to the petitioner the interest which had accrued during the period of the investment. In deciding that interest was not recoverable, this Court, per Mr. Justice Blatchford, said, at pp. 259–260:

> If there was any unlawful withholding from the petitioner of the $41,129.74, the money was withheld by the Government of the United States, acting through the Secretary of State, and any claim of the petitioner, based upon an unlawful withholding, was a claim against the Government of the United States. That claim, in the present controversy, assumes the shape of a claim for the increment or income alleged to have been actually received by the United States from the investment of the money for the time it was withheld; but the claim in that respect is not different in character from what it would

have been if, instead of being a claim for increment or income actually received by the United States, it was a claim for interest generally, or for increment or income which the Government would or might have received by the exercise of proper care in the investment of the money.

The case, therefore, falls within the well settled principle that the Unites States are not liable to pay interest on moneys against them, in the absence of express statutory provision to that effect. It has been established as a general rule, in the practice of the Government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration, or under private acts of relief, passed by Congress on special application. The only recognized exceptions are where the Government stipulates to pay interest, and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages.

We submit that the principle of the *Angarica* case should be applied to the situation presented here. The Secretary of State in that case was representing the United States Government in no different capacity from that occupied by the Alien Property Custodian and the Treasurer of the United States in this case. The money involved in that case admittedly belonged to a citizen of the United States just as the money in question here is alleged to

belong to the plaintiff. The Government in that case was holding the money merely in the nature of a trustee as in the case here. There, as here, Congress had made *no* statutory provision for the payment of interest.

This claim, therefore, is such that no interest thereon could be recovered in an action at law; and furthermore, in its present aspect, it amounts to a claim against the Government, upon which interest can not be recovered. These two rules of law, which forbid recovery of interest here, should not, we submit, be ignored or held to be inapplicable, merely because Congress provided that suits under Section 9 should be brought on the equity side of the court.

2. *This case was not a proper one for the exercise of chancery discretion in allowing interest.*

The Trading-with-the-Enemy Act provides that a suit brought like this one shall follow equity procedure, and this case was therefore tried on the equity side of the court. But, as has been shown, the cause of action was merely for unliquidated damages for nonperformance of an executory contract of sale. If it had not been for the war and consequent special legislation the action must have been at law. And no interest could have been recovered if plaintiff's assignor had prosecuted its common law action against Beer, Sondheimer & Co. in the New York Supreme Court.

Can the alleged debtors' inability to defend the suit *equitably* be availed of to increase the penalty? Is it equitable that the granting of a remedy against

property held by the Government in *quasi* trust should make the equitable owner of the property lose more than if sued directly?

The illogical unfairness of such exercise of chancery discretion speaks for itself. It is submitted, therefore, that no allowance of interest whatsoever should have been decreed, and that, if any chancery discretion can be held to have existed, the exercise thereof in the case at bar was so unequitable that it will be reviewed herein. If, therefore, the whole decree is not reversed, at least that part of it which allows any interest should be stricken out.

(B) *Even if it be held that it was not an abuse of chancery discretion to allow interest from the date when the state of war practically ended, its allowance from June 29th, 1916, was clearly erroneous.*

The date from which the trial court allowed interest was July 3, 1919, on the supposition that such was the day upon which all restrictions were taken off intercourse between citizens of this country and those of Germany. Actually, the date of that historical occurrence was some seventeen days later, of which fact this Court will doubtless take judicial notice. (War Trade Board Regulation No. 814 of July 20, 1919.)

However, if the decision of the Circuit Court of Appeals be sustained, the date upon which the war with Germany was practically terminated is of no importance, for the latter tribunal held that interest should be allowed from June 29, 1916, with no interruption whatever while the war was in progress. We

submit that the modification which increased the interest was entirely erroneous; because even if the claim could bear interest—

(1) *Service of the complaint in the Utah action was not a sufficient demand to start interest running.*

(2) *Interest would not run during the war period, that is, from April 5, 1917, to July 20, 1919.*

(1) The Circuit Court of Appeals stated that the rule of *lex fori* obtained in regard to interest. (Rec. p. 666.) It also said that the law was that the discretion of the trial court in awarding interest would not be disturbed unless there was "a clear abuse of discretion." (Rec., p. 666.) It, therefore, must have regarded Judge Hand's refusal to allow interest from June 29, 1916, as "a clear abuse of discretion."

The learned appellate court held that the service of the summons and complaint in the Utah action was a sufficient demand to liquidate the claim and start interest running. It cited four cases in support of this proposition, namely, *Dwyer* v. *United States*, 93 Fed. 616, *Kaufman* v. *Tredway*, 195 U. S. 271; *United States* v. *Curtis*, 100 U. S. 119, and *Tuzzeo* v. *Bonding Co.*, 226 N. Y. 171. These cases merely hold that the service of the summons and complaint *in the case before the court* was sufficient to start interest running as against defendants *who were actually before the court as the result of the service* of said summons and complaint.

Not one of the cases cited involved a claim for damages for nonperformance of an executory contract of sale. Not one of them decided that the summons and

complaint served in some action which proved abortive because the defendants were not brought before the court as a result thereof, was sufficient service to start interest running.

Furthermore, the complaint in the Utah action demanded $13,000 more than the amount at which the special master in this suit assessed the damages. This may have been due to the fact that at one time the Mammoth Company had included, in their original claim, an item covering certain concentrates of less than 33% zinc ore, which was taken off their final claim. (Rec. pp. 493–4.) It also seems that even after this action was commenced plaintiff was desirous of changing the amount demanded. (Rec. pp. 95–96.) Plaintiff still demands $42,000 more than was allowed.

As was said by the court in *Excelsior Terra Cotta Co.* v. *Harde*, 90 App. Div. 4, at pages 7–8:

> It can not be that one can be subjected to a liability for interest which depends upon a proper demand because he does not accede to an improper demand. The demand made by the plaintiff prior to the commencement of the action upon which the claim for interest has been allowed not only exceeded by $2,000, the amount due upon the contract, but it was also coupled with an illegal demand for $1,100 for extra work which had never been done, and for which, as already indicated, the court expressly found it was not entitled to recover anything. The contract did not in express terms provide for interest, and a de-

mand was, therefore, necessary to set interest running, and it is well settled that when such demand is necessary, it must be for the amount due, and if it includes any item not recoverable, the demand is illegal and interest can not be allowed. (*Cutter* v. *Mayor*, 92 N. Y. 166; *Deering* v. *City of New York*, 51 App. Div. 402; *Carpenter* v. *City of New York*, 44 id. 230.)

In view of the foregoing, and of the apparent inconclusiveness of the four authorities cited and relied upon by the learned Circuit Court of Appeals, we submit that it was not "a clear abuse of discretion" requiring appellate correction for the trial court to have refused to allow interest from June 29, 1916.

(2) *Interest should not be allowed during the war period.*

Whatever may be the conclusion reached as to the allowance of interest from July 29, 1916, to April 5, 1917, when war between the United States and Germany broke out, the allowance of interest for the period during which a state of war existed between the United States and Germany, and for the period subsequent to the war down to the present time, during all of which time the property of Beer, Sondheimer & Company has been in the hands of the Alien Property Custodian, is error and is contrary to well-established authority.

The interest here was undoubtedly awarded as damages. (Rec., p. 667.) The allowance of interest as damages is predicated on the theory that the

party in default has been, at all times within the period during which the award is made, in a position to pay, but has refused to do so. Interest comes as damages for the wrongful withholding. Can it be said that this case presents circumstances which make it a proper case for an award of interest as damages from April 5, 1917, to the present time?

From the moment the war broke out intercourse between the German defendants and plaintiff's assignor was prohibited. It has long been settled law that interest is suspended during the existence of a state of war when the debtor and creditor are subjects of the respective countries which are at war with each other. This rule of law is supported by abundant authority.

In 22 *Cyc.*, p. 1562, it is said:

> It is a general rule of law that when the debtor and creditor are citizens and residents of different countries, interest on the debt existing between them will be suspended during the period that their respective countries are at war with each other.

15 *Ruling Case Law*, p. 35:

> It is the well established general rule that as the enforcement of contracts between enemies made before war is suspended during the war, the running of interest thereon during such suspension ceases. Interest being the compensation allowed by law or fixed by the parties for the use or forbearance of money or as damages for its detention, it would be *manifestly unjust* to exact such compensation

> or damages, when this payment of the principal debt was interdicted.

The rule that war suspends the running of interest is of general application. In *Brown* v. *Haitts*, 15 Wall. 177, it was held that the Statute of Limitations was suspended and that *interest on loans* made previous to, and maturing after, the commencement of the Civil War, ceased to run during the subsequent continuation of the war, *although interest was stipulated in the contract.*

The learned Circuit Court of Appeals, in making an award of interest which extended over the period of the war between the United States and Germany, seems to have relied largely upon *Insurance Company* v. *Davis*, 95 U. S. 425. The conclusion of the Court was based on the theory that inasmuch as Beer, Sondheimer & Company had agents in the United States, the rule suspending the running of interest does not apply.

In *Insurance Company* v. *Davis*, *supra*, one Davis had a life insurance policy in a New York company. The New York company, before the Civil War, had an agent in Virginia who had *accepted* premiums from Davis, from time to time, and remitted them to the company in New York. After the outbreak of the war, the agent refused to *accept* further premiums when tendered to him by Davis. Upon the subsequent death of Davis, an action was brought to recover on the policy on the ground that the tender of the premiums to the agent relieved Davis of any de-

fault in payment of premiums. *The actual decision was that the war terminated the agency and that the tender to the agent was of no avail.*

Therefore, as far as the holding in that case is concerned, it only serves to strengthen our position. However, the Court went into a discussion of an exception to the general rule that war terminates an agency, and it was a *dictum* in such discussion that the Circuit Court of Appeals relied.

But even the *dictum* shows that the exception to the general rule that the existence of war terminates an agency is of limited application, for it was to the effect that if it could be established that the authority of the agent of the New York company to act continued, by consent of the parties, during the war, then it might be held that the tender of Davis was good. In other words, the agency might be presumed to continue where it was possible to determine from the acts of the parties that they so intended. It can be seen, therefore, that the reason underlying the exception is the giving of relief to a party who has *relied* upon an agency which formerly existed, and which *he regarded* as still existing. To deny the existence of the agency as to such person may work an injustice. The principle embodied in the exception, therefore, was intended to be applicable to a situation where the party *has already acted to his injury*. It is submitted that a rule, which originated in an endeavor on the part of the Courts, to give relief under a particular set of circumstances,

should never be applied by a court of equity so as to work an injustice. Especially is this true when the reason calling for the application of the rule is not present.

The application of the exception to this case so as to charge Beer, Sondheimer & Company with a wrongful withholding of money from the outbreak of the war between the United States and Germany not only does not arrive at justice between these parties but, on the contrary, operates to work an injustice upon Beer, Sondheimer & Company, in that it charges them with a wrongful act for which they are in no wise responsible. Even though it is assumed that the case is a proper one for the allowance of interest in its origin, yet to say that there is a wrongful withholding after the point of time was reached when Beer, Sondheimer & Company no longer had control over their property is to deny to them the right of exercising a *locus pœnitentiæ*. If it is decided that the case is a proper one for the allowance of interest at all, substantial justice can be done by allowing interest only up to the time when the rules of war forbade further business transactions between Beer, Sondheimer & Company and the plaintiff. This Court should not subscribe to a ruling which makes these suffer for their submission to the laws governing communications in war time.

Furthermore, the exception relied upon by the Court below relates only to agencies *to receive* money. To hold that an agents' authority to receive money may continue after war has been declared, is not to say that

an agent is to be presumed to have authority *to pay* money alleged to be owing from his principal. This Court recognized the distinction between an agency to receive and an agency to pay, in its consideration of the question in *Insurance Co.* v. *Davis*. In his discussion of the question as to whether an agency was to be presumed to continue during a state of war, Mr. Justice Bradley, at p. 431, said:

> Perhaps it may be assumed that an agent *ante bellum*, who continues to act as such during the war, in the receipt of money or property on behalf of his principal, where it is the manifest interest of the latter that he should do so, as in the collection of rents and other debts, the assent of the principal will be presumed, unless the contrary be shown; but that, where it is against his interest, or would impose upon him some new obligation or burden, his assent will not be presumed, but must be proved, either by his subsequent ratification, or in some other manner.

The record in the case at bar, far from showing that Salinger, upon whom the Utah complaint was served, had authority to pay the amount demanded, shows that Salinger was not a general agent, but only a special agent of Beer, Sondheimer & Co. (Rec., pp. 595, 174–175).

Moreover, the language of the Trading-with-the-Enemy Act, which was passed October 6, 1917, makes it clear that at any time thirty days after the passage of the statute it would have been a violation of its provisions for *any* agent of Beer, Sondheimer & Co.,

without obtaining a license from the President, to have paid or compromised the claim of the Mammoth Company. It also would have been unlawful for the latter to have accepted any proffered payment or compromise, without obtaining a like license. (See Secs. 2, 3, 4, 7; 40 Stat. 412, 414, 417.)

Section 2 defines trading, and reads, in part, as follows (40 Stat. 412):

> The words "to trade," as used herein, shall be deemed to mean—
>
> (*a*) *Pay,* satisfy, *compromise* or give security for the payment or satisfaction of *any* debt or *obligation.* * * *
>
> (*c*) Enter into, carry on, *complete* or perform *any contract, agreement* or *obligation* * * *.

Section 3 makes it unlawful—

> (*a*) *For any person in the United States,* except with the license of the President, granted to such person, or to the enemy, or ally of enemy, as provided in this Act, *to trade,* or attempt to trade, either directly or indirectly, *with,* to, or from, *or for,* on account of, *or on behalf of,* or for the benefit of, *any other person, with knowledge or reasonable cause to believe that such other person is an enemy* or ally of enemy, *or is conducting* or taking part in such *trade, directly or indirectly,* for, or on account of, *or on behalf of* or for the benefit of, *an enemy* or ally of enemy.

And the fifth paragraph of Section 7 (40 Stat. 417) removes any possible doubt but that a voluntary

payment of a disputed claim to a citizen or non-enemy by persons carrying on business here on behalf of enemies would have been illegal, without Presidential license or permission. No general license, we are informed by the State Department, was issued by the President under said Section 7; and the Record herein shows no special license granted to either party to the agreement sued upon.

Therefore, both the common law rules forbidding commercial intercourse between enemies, which are expressly left unaffected by the Trading-with-the-Enemy Act (see Section 7(*b*); 40 Stat. 416), and that statute itself, prohibited the German defendants or their agents from paying the unliquidated claim sued upon, and made it unlawful for plaintiff's assignor to accept payment from them. Nevertheless, this modified decree, by making them pay interest during the war period, has penalized Beer, Sondheimer & Company for their compliance with the law.

It is submitted, therefore, that Circuit Court of Appeals' decision on this question of interest was entirely unsound; and, if the whole decree is not reversed, the part relating to interest should be stricken out or, at least, modified to its original terms.

## CONCLUSION.

Since the decree, not being authorized by section 9 of the Trading-with-the-Enemy Act, was *coram non-judice;* since (2) the alleged contract was a mere "will, wish, want" agreement or *nudum pactum,*

lacking in mutuality; since (3) the plaintiff's assignor did not perform his part *bona fide*, but flouted an essential clause of the agreement; since (4) the making of the agreement was *contra bonos mores*, in view of the previous contract with the American Metal Co.; since (5) there was no proof of actual damages; and since (6) the allowance of interest is wholly inequitable and party at variance with the laws of war and the Trading-with-the-Enemy Act—**the decree of the Circuit Court of Appeals, modifying the decree of the District Court and affirming the same as modified, should be reversed and the case remanded with directions that the bill of complaint be dismissed with cost in all courts or, at least, the decree should be modified by reducing the amount in accordance with the point (V) hereinabove made as to the damages and/or the points (VI) hereinabove made as to interest.**

Respectfully submitted.

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MARCH, 1924.

# EXHIBIT A.

*Statement showing smelting profit realized on Mammoth ore involved in suit.*

Based on: (A) Purchase price assigned to ore.
(B) Smelting cost.
(C) Net sales price of spelter recovered.

| (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) Zinc operation. | | (9) | (10) | (11) | (12) |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Month of smelting. | Tons smelted, dry wgt. | Cost of ore. | Smelting cost per ton. | Cost of smelting. | Total cost. | Zinc contents (lbs.). | Loss (%). | Recovery (%). | Metal recovered (lbs.). | Sold at (cents per lb.)— | Amount. | Profit. |
| ALTOONA PLANT. | | | | | | | | | | | | |
| 1915. | | | | | | | | | | | | |
| July | 145.016 | $5,719.67 | $16.414 | $2,380.29 | $8,099.96 | 122,688 | 21.67 | 78.33 | 96,086 | 12.365 | $12,841.89 | $4,741.93 |
| August | 565.993 | 20,655.32 | 16.41 | 9,287.95 | 29,943.27 | 458,622 | 20.16 | 79.84 | 366,164 | 16.277 | 59,600.51 | 29,657.24 |
| September | 1,357.495 | 50,222.13 | 14.827 | 20,127.58 | 70,350.71 | 1,105,077 | 26.404 | 73.596 | 813,734 | 14.673 | 119,379.19 | 49,028.48 |
| October | 1,615.728 | 60,611.82 | 15.562 | 25,127.80 | 85,739.62 | 1,328,703 | 22.34 | 77.66 | 1,031,571 | 14.676 | 151,437.39 | 65,697.77 |
| November | 1,451.124 | 47,751.71 | 16.449 | 23,869.54 | 71,621.25 | 1,118,554 | 15.55 | 84.45 | 944,619 | 14.481 | 136,790.28 | 65,169.03 |
| December | 725.498 | 20,701.33 | 14.177 | 10,285.31 | 30,986.64 | 554,171 | 20.74 | 79.26 | 429,236 | 13.929 | 61,181.18 | 30,194.54 |
| 1916. | | | | | | | | | | | | |
| January | 272.798 | 8,629.22 | 15.282 | 4,168.90 | 12,798.12 | 204,887 | 21.03 | 78.97 | 161,799 | 12.3485 | 19,979.75 | 7,181.63 |
| February | 618.727 | 20,348.22 | 16.427 | 10,163.83 | 30,512.05 | 476,134 | 19.8 | 80.2 | 381,850 | 12.634 | 48,244.07 | 17,732.02 |
| March | 443.557 | 17,515.73 | 16.501 | 7,320.46 | 24,836.19 | 365,371 | 23.— | 77.— | 281,336 | 13.565 | 46,575.17 | 21,738.98 |
| April | 52.628 | 1,950.94 | 21.043 | 1,107.45 | 3,058.39 | 43,471 | 23.— | 77.— | 33,478 | 16.142 | 5,404.02 | 2,345.63 |
| May | 210.807 | 7,690.46 | 21.193 | 4,469.54 | 12,160.— | 172,077 | 24.09 | 75.91 | 130,623 | 16.386 | 21,403.88 | 9,234.88 |
| June | 694.029 | 25,182.63 | 23.096 | 16,029.29 | 41,211.92 | 560,325 | 24.72 | 75.28 | 421,813 | 16.141 | 68,084.83 | 26,872.91 |
| July | 529.338 | 18,266.65 | 23.099 | 12,227.18 | 30,493.83 | 416,302 | 23.90 | 76.10 | 316,806 | 11.037 | 34,965.88 | 4,472.05 |
| August | 195.928 | 7,154.31 | 18.923 | 3,707.55 | 10,861.86 | 159,819 | 24.72 | 75.28 | 120,311 | 10.508 | 12,642.28 | 1,780.42 |
| September | 290.185 | 10,541.51 | 18.502 | 5,369.— | 15,910.51 | 233,937 | 24.66 | 75.34 | 176,248 | 10.201 | 17,984.35 | 2,073.84 |

*Statement showing smelting profit realized on Mammoth ore involved in suit*—Continued.

| (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) Zinc operation. | | (9) | (10) | (11) | (12) |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Month of smelting. | Tons smelted, dry wgt. | Cost of ore. | Smelting cost per ton. | Cost of smelting. | Total cost. | Zinc contents (lbs.). | Loss (%). | Recovery (%). | Metal recovered lbs.). | Sold at (cents per lb.)— | Amount. | Profit. |
| IOLA PLANT. | | | | | | | | | | | | |
| 1916. | | | | | | | | | | | | |
| February | 205.404 | $7,596.28 | $20.851 | $4,303.73 | $11,900.01 | 167,831 | 21.46 | 78.54 | 131,814 | 12.634 | $16,653.38 | $4,753.37 |
| March | 99.374 | 3,560.— | 20.523 | 2,039.35 | 5,599.35 | 79,995 | 22.87 | 77.13 | 61,700 | 13.555 | 8,363.44 | 2,764.09 |
| Totals | 9,474.714 | 334,116.93 | [1] 17.095 | 161,[illegible].75 | 496,101.68 | 7,568,544 | [1] 21.92 | [1] 78.08 | 5,909,497 | [1] 14.241 | 841,551.49 | 345,449.81 |

Less cost of freight, commissions, miscellaneous and interest. (Not taken into account in sale price nor smelting charge.)

29,600,984 lbs. =$62,032.71

Ore cost per ton ............ $35.26 Our proportion ...... 5,909,497 " =19.9638% ........ 12,384.09

Profit per ton of ore ......... 35.16 ........ 333,065.72

[1] Average.

NOTE.—Sources of above figures:

Columns Nos. 1, 2, 3, 7, taken from Ores Received Books and Ore Purchased Books (Pelf's. Exhs. 13, 14, 15).

" " 4, 8, 10 " " Cost sheets (Deft's. Exh. C).

" " 5, 6, 9, 11, 12 obtained by calculation from other columns.